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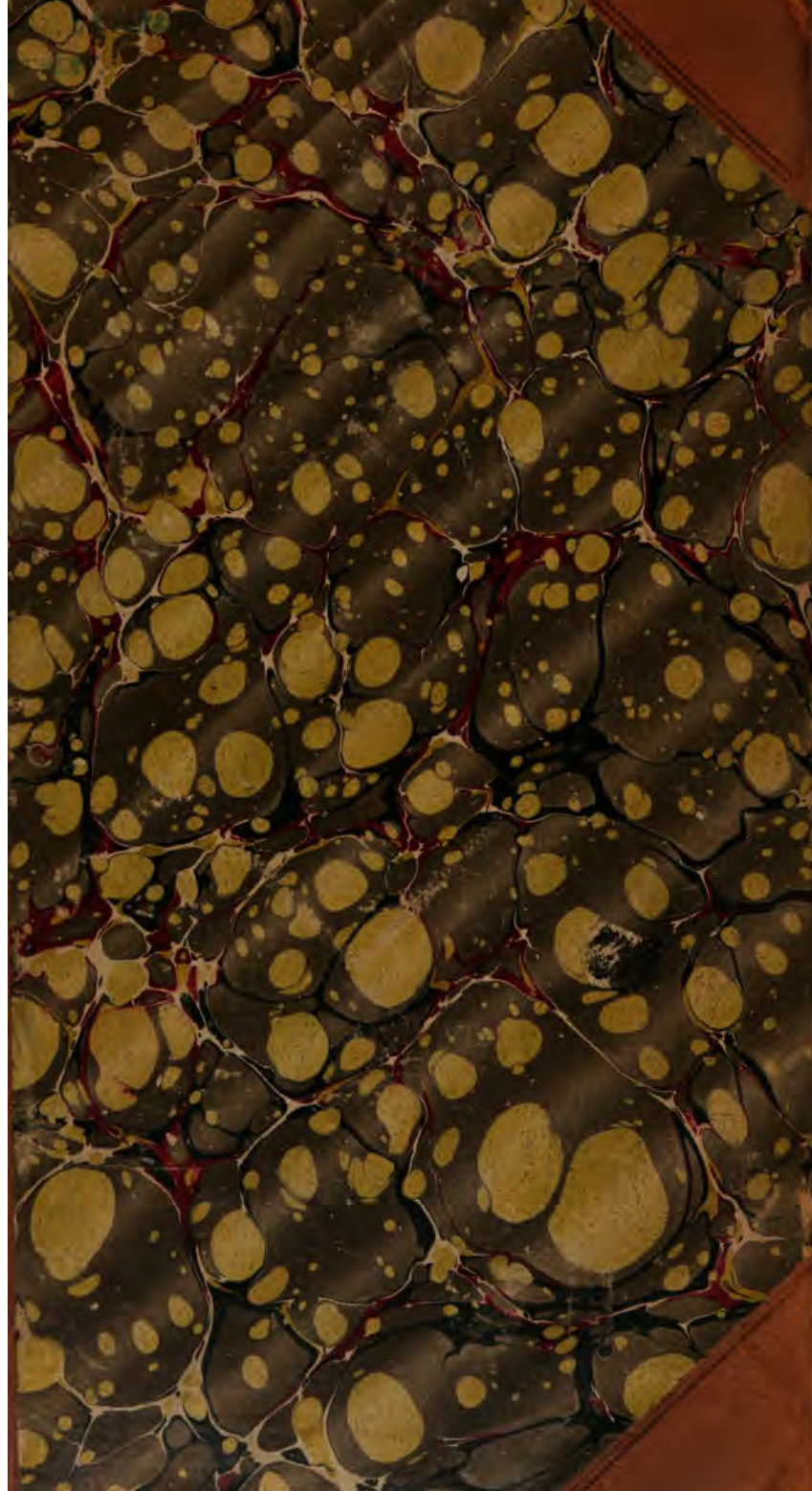
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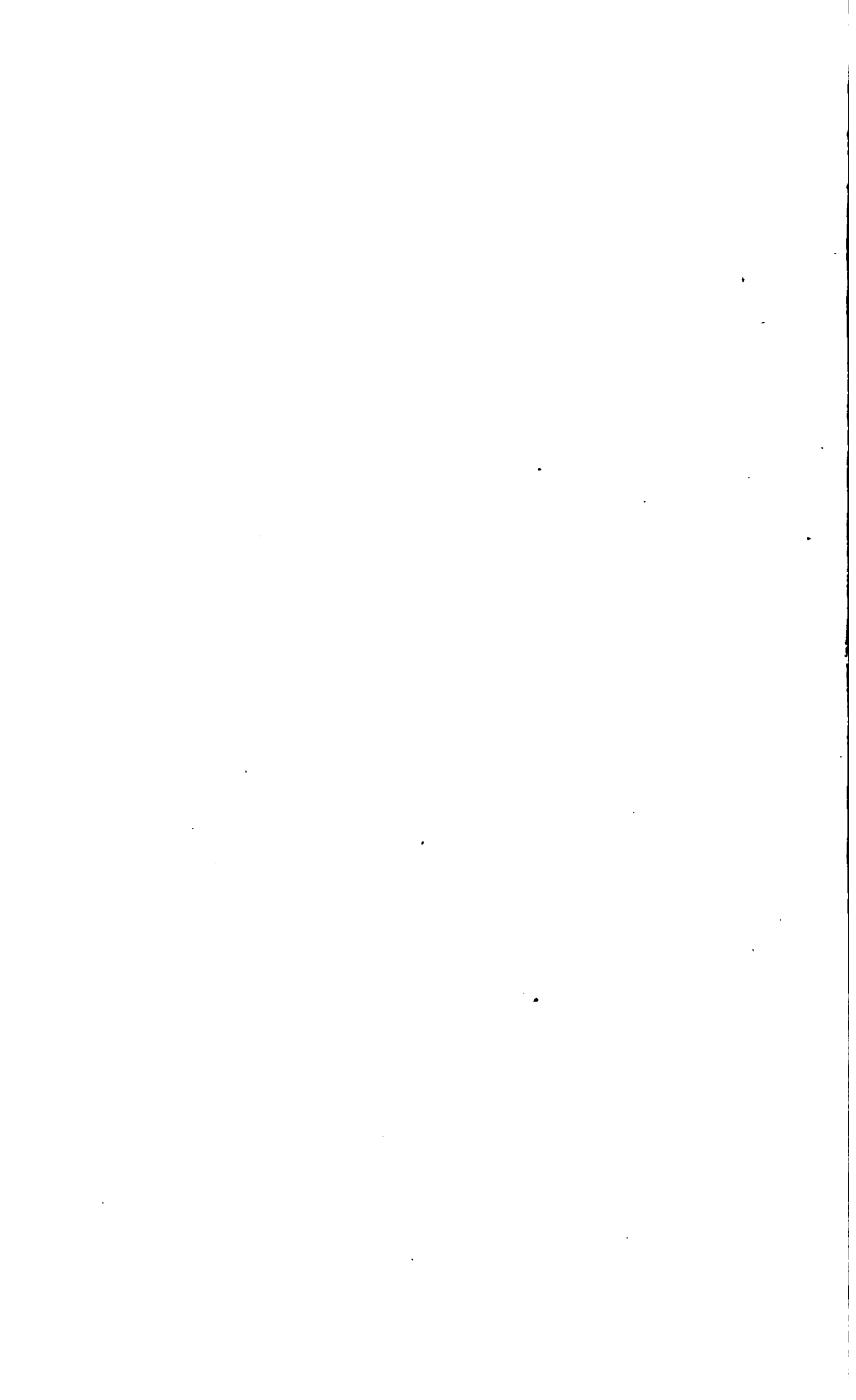
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## ERRATA.

Page 116. line 14. for "1776" read "1767."

184. lines 16, 15. from bottom, delete the comma after "swear" and insert it after "answer."

line 14. from bottom, for "do it" read "administer the oath."

line 10. from bottom, for "men" read "wen."

187. line 10. for "people accurate" read "people's doings accurate."

188. line 7. from bottom, for "disappointment; for" read "disappointment — for."



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THE

# LAW REVIEW.

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## ART. I.—RAILWAY LEGISLATION. BOARD OF TRADE.

THERE is not in the system of any civilised country a more singular anomaly than the constant, regular, and indeed every-day interference of the British Parliament with the most important interests and the most sacred rights of individuals. The laws make certain provisions to regulate the acquisition, the transfer, the enjoyment of property; certain other provisions to regulate the possession of personal rights and conditions. According to these rules alone, were the system perfect, or did it make an approach to perfection, all questions respecting men's possessions and their personal condition, all questions of property or of status would be determined. By laws generally applicable to the whole community, and not by particular laws made to regulate individuals, the possession of property and of status would be determined. By laws made prospectively, and before the question to be decided had arisen, would every thing be regulated, not by *ex post facto* laws constructed to suit a particular emergency, and made after the matter had come into dispute. Far otherwise is our English system of jurisprudence; and we give it this name advisedly, because the passing private acts, acts applicable to particular places, and dealing with the rights of particular individuals, has become as much a regular and understood portion of our system, is supposed to be defined and governed by principles as well known, and is subject to as well defined a course of practice as

any of the actions that are brought, or the indictments or informations that are prosecuted, under the ordinary jurisdiction of the civil and criminal tribunals.

Thus a will or a settlement has been made by a proprietor who had the undoubted right to dispose of his inheritance as he pleased within the limits prescribed in the general laws existing when he devised, bequeathed, or settled his money and his land. These laws have in no respect been altered since his decease; they still continue to regulate the transfer or enjoyment of all other men's estates, real and personal. But it is found inconvenient to those who take under such will or settlement, that they should be tied up in their enjoyment, or, it is suggested, that a public benefit may be gained by setting those devisees and legatees free from the fetters imposed upon them; and a new law is made operating on this particular case, this one will or this one settlement, upon some speculation, that had the testator or the settlor been able to foresee the present state of circumstances, he would have altered his arrangements. The law makes a new will or new settlement for him.

Again, the law is clear that no man's property shall be taken from him without his consent; but certain persons have devised a plan which they report to be of public benefit. It consists in taking many men's property from them whether they will or no, and giving them for it not what they demand and have a right to claim as the price of their consent, but what a jury shall think sufficient. The property is thus forcibly to be seized and used by the projectors of the scheme for the public good; and a law is made to give them this power of seizing and using. All this, too, is practised, and daily practised, in a country which is so exceedingly delicate in protecting all rights of property from even nominal violation, that if A. holds his hand over a close belonging to B. without his consent, he is a trespasser, and liable to be sued when he must needs pay a farthing damages, and the costs of his own defence to the action.

Many cases occur daily of persons being seriously damned by such speculations, without the possibility of receiving any equivalent at all, nay, without even the ceremony being gone through of asking their consent. A work in the nature

of a nuisance is erected on A.'s land whether he will or no ; he receives compensation such as it is ; but B., near whose land or dwelling the nuisance is erected, neither is compensated nor considered, because it does not go on, but only near his premises, though his property is all but destroyed by it.

So, too, by our undoubted law, marriage is an indissoluble contract. Once a husband always a husband, says the law. But, to release the party injured by his wife's infidelity, a private law (*privilegium*, as the Roman civilians called it) is made for each individual case ; and the rules by which this kind of legislation is governed, are as accurately ascertained as any of the rules by which rights are declared in Courts of Law, or any of the rules by which many foreign countries decide judicially questions of divorce.

So our law holds all children born in lawful wedlock to be legitimate, unless there may have been an impossibility of the parties having cohabited at the period, or immediately before the period of conception. But by private acts, children too young to know what legitimacy is, nay, children unborn, are declared to be bastards upon like grounds.

Another instance regards the *status* of aliens, though this branch of personal legislation has of late been somewhat curtailed.<sup>1</sup> Children born out of the realm, and whose fathers and grandfathers were both aliens, are by the undoubted Law of England aliens, and can enjoy no civil rights of any importance in this country. But bills are brought in and passed very frequently to confer on such as can afford to pay for it, the *status* and privileges of natural born subjects.

The first thing which strikes the observer is the highly eminent nature of this legislative power. It snaps all the chains of all the laws the most sacred and the most binding. It is the whole force of the supreme power in the state, the omnipotence of the Legislature, directed to one particular case, brought to bear upon individuals utterly defenceless, wholly incapable of offering any resistance. Then we perceive that it is a power which violates every previous general disposition of the law, introducing wholly new principles, recognising unknown rights, permitting unheard-of wrongs.

<sup>1</sup> See Law Review, vol. i. p. 122.

Again: it is not only thus permitted and thus exercised, but it is called into existence for the particular occurrence, and for that alone. Furthermore: it is retrospective in its nature and operation, so that no mortal who may be affected by it could, beforehand, by any possibility have governed his course according to its exigency, or protected himself from its operation.

Some of these special interpositions of the legislative power are rendered necessary by the defective state of the general law. Thus, the absurd cruelty of admitting any foreigners to deal with us and to reside among us, and yet withholding from them the most ordinary as well as the most important rights of natural born subjects, inevitably led to a relaxation of the harsh rule. It is another thing to maintain that the relaxation must needs be applied only in special cases instead of being given by a general arrangement, from which all might alike benefit. So the great hardship, nay, the immoral tendency of the law making marriage indissoluble, and so exposing a man to have spurious issue palmed upon him, and preventing him from getting rid of an abandoned wife, or marrying another, rendered the process of divorce by some special provision necessary, that there might not be a failure both of justice and morality; but it is not equally clear that this provision must needs be made by Act of Parliament when a judicial remedy might be far better applied, which persons of all ranks could benefit by.

The public interest is likewise supposed to require that some compulsory power should from time to time be given to facilitate the execution of works highly beneficial to the community, and which a single obstinate party could prevent. This is, however, not quite so clear. If the community is to benefit greatly, it should be prepared to pay highly for the advantage, and we are by no means certain that the safe course would not always be to let the bargain be made voluntarily, and leave the rights of property sacred and untouched. That any one would hold out against very large offers, is impossible; because the other parties would then not go on with their scheme, and so the obstinate or sordid proprietor would obtain no price at all. He knows this, and will in proportion to his avarice be unwilling to sacrifice all the gain he might wish to make. As for his obstinacy from dislike to

the scheme, this ought to be overcome by high, even very high, payment; for this is his unquestionable right to indulge, unless all property is a mere name.

But without carrying our doctrine so far, at least we may safely lay it down as a position resulting from what has been said respecting this extraordinary and eminent function of the legislature, that it should be guarded by every check which can be devised against abuse; that it should only be exercised after the most anxious inquiry into all circumstances in the scheme, all rights and interests of parties whom it may affect; that the most minute and deliberate attention should be given to the whole arrangements proposed; that the continual leaning should be against the grant of the extraordinary powers sought; above all, that the utmost care should be taken to construct the tribunal which is to decide on these high matters in such a manner that the utmost impartiality and a consummate capacity for conducting the inquiry should reside in all its members. We believe it is now universally confessed that the tribunal before which these most important matters are brought, is little entitled to claim any such character; that the manner in which these inquiries are conducted, is any thing rather than that of the kind which has been described.

It is only necessary to consider for a moment the constitution of the Lower House of Parliament to be satisfied that nothing can be less fitted for exercising judicial functions, and those of which we are speaking are purely judicial. Any act of a private or personal nature, any statute which makes an exception to the general law of the land is necessarily of a judicial, and not at all of a legislative, description. The decision of contested claims to preference, — that is, first having the general law repealed in the favour of one or of the other, — the determination of conflicting petitions to obtain an advantage or escape a burthen, much more the application for a personal benefit in favour of one individual, or a personal burthen to be imposed on another; these are not in the least degree legislative, but only judicial matters, and to be dealt with by judicial rules. Now, no tribunal can be worse constituted for judicial functions than the House of Commons. The Lords form a Court of Judicature, and may be supposed therefore to be better fitted for the kind

of judicial legislation in question. But though it be so in theory, yet in practice only three or four of their number sit upon appeal causes, thus confessing that the body at large is not fitted to administer justice. How much less are the Commons fitted to discharge this duty ! There is the total want of practised knowledge in such matters ; there is the equal want of all individual responsibility ; there is the too great number of the members ; there is the inevitable exposure of each to the arts and solicitations of parties whom they may hear in private and behind each other's backs. All these things make this the very worst court in the world for trying causes of any kind. It is true that a contrivance is had recourse to for lessening the frightful evils of the whole House acting judicially. Committees are chosen to exercise the judicial power. But though this may mitigate, it never can remove the evil. There is still the want of experience, the want of responsibility, and the accessibility to influence.

We have only to view the working of the Grenville Act, that we may be convinced how unfit the Commons are for judging. Before the year 1770, all causes of contested elections were heard by the whole House sitting and voting together. The members avowedly acted corruptly in all questions of this nature ; for can we call it any thing else than corruption, when each right to a seat was determined by the parties who divided the House as they did on any other question, each member voting with his faction, so that the majority of one against Sir Robert Walpole, in the case of the Chippenham Election, overturned his ministry which had lasted twenty years. The shame of so infamous a scandal became at length too great to be endured, and the Act passed which referred all election cases to a select committee chosen by ballot, that is, by lot, in each case, the parties naming two members to look after their interests, but sworn, like all the others, to try according to their consciences, which each construed to mean, his several conscience. The power of administering oaths was also given to these committees. A considerable improvement was by this change introduced ; but party still interfered ; and as when the lists were at first of a larger number, each party was allowed to strike off so many, it was always seen, that the object of both was not only to keep out



each other's political adversaries, but also to exclude all the ablest members, there could be no doubt that the less gifted men were expected to follow their party colours, or, perhaps, to take private hints from the parties between whom they had sworn to judge impartially.

After many further alterations, all arising from the general impression that justice was ill-administered before even this better tribunal, we come to have the existing system<sup>1</sup>, which leaves the trial of each case to five members, and these are thus chosen. From one of five panels into which the house is divided, four are taken by lot; two being ministerial, and two opposition, members. Then a chairman is chosen from a third panel, which is formed by the general committee, named by the Speaker, but containing equal numbers of both sides. The whole depends then upon the vote of the chairman; that is, upon the lot which selects him from the third list. If the system works well, and excludes all party influence, the points will, in succession, be determined, and the final decision will be given probably by unanimous votes—certainly by great majorities, and the colours of the chairman's political party will be no index to the result in any case. There is a slight alteration in the system by the Act of last session; but so far as the past is concerned, how stands the fact? The whole result, the ultimate division in each case, was almost uniformly found to depend on the chairman. The committee, until the present year, were seven in number: the three tories voted together one way; the three whigs voted together another way. The vote of the chairman, therefore, decided; if he was tory, there were four to three for the tory party; if he was whig, there were four to three for the whig party. This has been repeatedly shewn in Parliament by analyzing the votes and the returns as given to the public by the Commons' House itself.

It has long been the opinion of all rational men that the jurisdiction in election cases ought to be taken from the Commons, or rather abandoned by them, on account of their total unfitness for exercising it. But it is said that the

<sup>1</sup> 7 & 8 Vict. c. 103.

House cannot give up this sacred privilege of deciding upon contested elections. Yet when this doctrine was once broached in the House of Lords, Lord Canterbury, long Speaker of the Commons, declared that the argument was groundless, for the House had, ever since 1770, abridged the privilege by giving up the exercise of it to a select and sworn committee, pronouncing judicially, and trying every question according to the rules of evidence recognized by the courts of law; whereas all matters of privilege, and, indeed, all matters cognizable by the House in its ordinary capacity, whether legislative or inquisitorial, are disposed of without any regard whatever to the legal rules or forms. If, then, the House, from a consciousness of its inability to try election cases, gave up long ago the privilege to a committee, why, he justly asked, should it not transfer the inquiry from the committee when it is found still to be a most imperfect and unsatisfactory tribunal for trying such cases?

It is quite true that cases of this description stand in a somewhat different predicament from the greater part of other questions which arise before committees of the Commons, inasmuch as they necessarily excite stronger party feelings than any others, and thus tend more certainly to corrupt the tribunal and pervert its judgments. But, on the other hand, it must be observed that questions touching the due election of members, the right to seats in the House, are beyond all others capable of being represented as connected with privilege, and so the difficulty of removing them from the immediate control of Parliament becomes proportionably greater. We are, indeed, very clearly of opinion that this difficulty never can be regarded as insuperable. No consideration ought to stand in the way of securing the first end of all trial — the doing strict justice between the parties. No argument can ever be listened to which, admitting that a tribunal is so constituted as to prevent the possibility of its deciding justly, pretends that it cannot suffer itself to be stripped of the jurisdiction which it grossly abuses. No set of men can be suffered to tell us that they insist upon the right to do wrong; the monstrous privilege of exercising functions which they cannot but abuse; the wicked, the outrageous power of being judges in their own cause. Where, but in

the House of Commons, was it ever heard that a court of judicature must be composed of numbers of the parties to the suit, all ranged together and against each other, and equal to one another, in order to prevent the one from defeating the other but with a casting vote given by chance, a vote taken blindly from among the adherents of the opposite sides? Why, the old plan of compurgators was nothing to this; for they were only vouchers or witnesses, who swore to their belief in the stories of the conflicting parties, but the court that had to decide belonged to neither side. Nor is the difficulty which some have affected to see in providing another and better tribunal any kind of reason against making the transfer; because no other tribunal could possibly be devised which must not be less objectionable than the present. What would be said of the decision of a Court in Westminster Hall, which ruled the self same point opposite ways on the same day, because it happened that one or two of the Judges had been changed between morning and evening? Surely no reporter would ever take the trouble of recording the determinations of such a tribunal, nor would any one consult these reports if he did. That it is verging towards its latter end may be very confidently foretold without the gift of prophecy.

It must not, however, be supposed that the transfer of jurisdiction is unnecessary even in cases where the spirit of party interferes far less regularly with the administration of justice. There may be little risk of this perversion in divorce bills, estate bills, and naturalization bills, though there are other reasons against retaining these within the walls of Parliament. One is that the subject-matter is altogether unfit for discussion in Parliament, and is quite of the kind which belongs to the inquiries of ordinary judicatures. Indeed, the course almost uniformly pursued on such bills, of leaving them to the one branch, the judicial, of the Legislature, and that branch consigning them to the few law lords, shews in what light these bills are practically viewed. We say almost uniformly, for there are occasional examples of the House of Lords interfering as a body, and upon one divorce bill, some dozen years ago, the friends of a party mustered so strong as almost to defeat the few law lords, and carry it against the Chancellor and

his brethren. A case, too, occurred in the Commons of a similar bill being lost through the indignation excited by the party promoting it, who indecently appeared in his place to prevent the provision made for his wife. These are rare instances, it is true ; nevertheless, the bare possibility of their ever occurring is to be taken into the account, and it works strongly in favour of the change. The more powerful reason, however, is to be found in the undeniable certainty of the enquiry being much more fully and ably conducted by a regularly constituted judicial tribunal. Accordingly, the Lords appear disposed to adopt this course. A select committee last session, reported in its favour, so far as divorce bills are concerned, and the bill founded on that report was only postponed in order to make the measure more perfect by dispensing with the proceedings in the Ecclesiastical Court, the greatest source of the expence attending divorces. The measure contemplated the transfer to the Judicial Committee of the Privy Council ; and a bill for this purpose is now before the Lords.

If the Lords, the judicial branch of the Legislature, the highest court of justice in the country, and which, generally speaking, exercises its functions as such, in a manner satisfactory to the parties as well as the community at large ; if this branch of the Parliament has come to the resolution of laying down one portion of its judicial functions in order that another tribunal better qualified to perform them may take them up — surely it is reasonable to expect that the Commons, undoubtedly less fit for exercising such powers, should make a like surrender. It is true that questions of privilege will still continue to comprehend claims to the peerage. This arises from the Crown having the sole right to issue a peer's summons ; and from the Crown usually referring the question, if disputed, to the Lords, whose report is usually acted upon by the Crown. Such a reference, however, is not by any means of course, or indispensable ; and on one contested case, the Chancellor, all hesitating and doubting as he was wont to be on points of little difficulty (for it was Lord Eldon), without any hesitation or doubt ordered the issuing of a writ, whereby a noble lord now sits as a peer, having thus obtained a peerage claimed by another. The opinions of the profession were,

we undertake to say, very far from according with that upon which Lord Eldon acted in the case. But this is not all. Observe in what way the Lords invariably exercise this delicate jurisdiction, when the reference is made to their decision. They act as in all ordinary cases of appeals and writs of error; the law lords alone take a part in the discussion, and to them is almost always left the determination of the claim. Never was there the least suspicion cast upon the judgment pronounced being in the most remote degree influenced by the spirit of party, even when that spirit raged the most on all other questions. In the Commons, on the contrary, the claims to sit are now and ever have been, and, while the grand abuse continues, ever must be, decided according to the known party connections which divide the house and the country.

We have stept aside from our proposed argument, and recurred to the former part of these observations for the purpose of profiting of the light thrown upon them by referring to the proceedings in the Lords. We now come again to consider the reasons for transferring other matters as well as elections, and having mentioned the kind of bills least calling for the transfer, we may now advert to those which, next to election cases, seem imperatively to require the change, and which, far more easily than election cases, might be removed beyond the walls of Parliament. We mean bills for facilitating the enjoyment of property or the construction of public works; as Inclosure Bills, Road Bills, Canal Bills, Dock Bills, Railway Bills — all of these now form huge masses of business which it is altogether frightful to contemplate, both from the oppression which they entail upon Parliament, wholly unable to grapple with the load under which it groans, and from the mighty importance and value of the interests which they involve, almost every one of them affecting greater and more varied interests than the ordinary tribunals of the country dispose of in a year.

When we consider the vast amount of property which the Railway bills alone of a session deal with, we stand aghast at the bare contemplation. Millions and millions of capital are invested in these speculations, — thousands of persons are to find employment in their various departments: all capacities from the higher attainments of the scientific man

through every gradation of talent, of knowledge, and of industry, down to the humble labourer, are to be put in action; vast commercial and agricultural and manufacturing interests are to be dealt with, being affected in every quarter of the empire; the comforts, nay, almost the existence, of those who own or who cultivate the soil are to be consulted or to be wholly disregarded, and their long enjoyed and dearly cherished rights of property to be protected or to be grossly violated: such is the spectacle presented to our view by the bare suggestion, that there are some scores of railway bills ready for discussion at the commencement of a session; and it is said that nearer three than two hundred such are now actually prepared.

But this is not all. We find that not one of those bills can proceed without raising questions of the utmost nicety in science and art; other questions of the utmost importance in law; and other questions of the greatest uncertainty on the conflicting evidence brought by adverse parties. All these discussions await the wisdom, the experience, the legal learning, the habit of dealing with evidence, the habit ever late acquired of fixing the attention undivided, undisturbed, on the case in hand, the habit, equally late acquired, of calmly considering conflicting claims; in a word, the judicial resources of the House of Commons.

Nor is even this all, or any thing like all, that strikes, that staggers, that well nigh prostrates the mind, in contemplating the awful aspect of the railway preparation. The questions to be submitted are not like the ordinary points that come before courts; whether A. or B. shall have a given estate; whether or not a certain alleged contract has been made between them; whether or not the contract shall be performed, or, if broken, what compensation shall be awarded for the breach. These points may, indeed, arise incidentally, but the questions to be raised are of a truly transcendental nature. The particular declarations in the wills of the dead are to be violated; the solemn promises of marriage settlements are to be set at nought; the interests of infants, of lunatics, of married women, are to be dealt with, — none of them consenting or being capable of giving a consent. Then, the much cherished rights of proprietors are to be disre-

garded, the possessions most valued by them to be severed, the whole property of the community is to be used for purposes in which the owners have no interest, or which are directly at variance both with their interests and their wishes. Surely a tribunal which is to exercise such eminent powers ought to be constituted of the wisest, most esteemed, and, above all, most impartial judges. Surely the most especial care should be taken to shut out all access of interested motives from such a judicature as this.

Then, is the House of Commons or any of its Committees, chosen in any way that can be devised, acting in any manner that can be suggested, such a tribunal? The Lords sit for life in their House; hence their judicial functions can easily be confined to a certain selected number of their body. The Commons are elected, and they are a fleeting and a variable body. They contain, too, no lawyers who are not actually practising advocates; whereas the Lords can have none such among them, and always have the aid of those who are, or who have been, on the Bench. The Commons are of necessity under some influence of their constituents. The Lords have no such master, and are liable to no account. The Commons cannot shut their ears to their constituents, who have a right to see and to communicate with, and, if they please, to control their representatives. The Lords can, at once, refuse to see any party interested in a bill, as would a juryman or a judge to see the party in a suit before him. The Commons engaged generally in business unconnected with Parliament have not time thoroughly to examine and sift each case with the patient care which its details require. The Lords have their time much at their own disposal. Yet, with all these advantages, every change made in the present business of the Lords has been uniformly in the direction of repudiating their judicial functions as a body, and all the further changes now contemplated tend towards the same point. The Commons, with far less judicial advantages, with almost every impediment to the due and fair and satisfactory performance of such functions, obstinately persist in refusing to yield them up.

Let us only observe the important improvement introduced into the Lords by Lord Brougham, by the new standing

orders of 1837, unanimously agreed to by a committee which investigated the subject, and as unanimously adopted without a moment's hesitation by the House. A committee of five peers, who usually take the chief part in regulating private business, but especially in every private bill passing through Parliament, is named at the beginning of each session: and in their hands is placed the choice of all committees on private bills that are contested. Those committees likewise consist of five. The committee of five on the bill meets at eleven each day, and must sit till four, unless the House gives them leave to adjourn earlier and meet later. All the five members, too, must be present, and they appoint their chairman. If any member be absent, the committee must adjourn until the House gives leave for the other four to proceed, and the absent member must show cause to the House for his non-attendance, by giving evidence that it was occasioned by some necessity and was not voluntary. No peer who has any interest whatever, direct or indirect, in the bill, or any connexion with parties who have such an interest, can sit on the committee; and no other but the five peers can take any part whatever in the proceedings, though all the business before the committee being transacted in public except the vote, all peers may attend as spectators like the rest of the public. It is needless to observe how effectually this plan now in active operation during seven sessions has simplified, shortened, and in all respects improved the Lords' jurisdiction over contested bills. There remain serious objections doubtless, and the entire transfer to regular judges, with the aid, if occasion required, of a jury would be greatly preferable even to this improved jurisdiction, but compared with the unimproved tribunal which still exist in the Commons, the Lords' committees may almost be called faultless.

After vehement opposition, and many fruitless attempts at amendment, there has been, the other day, something on the same plan introduced into the Commons. Before this reformation was effected, men naturally directed their attention to the recorded proceedings of the lower house and its committees. It was found that on contested bills fifteen or twenty days were consumed in committee, with all the vexation and all the costs of these lengthened sittings to all the parties, when a single day or a day and a half sufficed to pass the same bill through the



Lords' Committee; and this though on some occasions eight or ten different parties were heard by their counsel and witnesses. But that is the least of the advantages gained by the comparison. It appeared that in the Commons for the first eight or ten days few members belonging to the committee ever attended. But as soon as the counsel had been nearly all heard, and the evidence of the witnesses all examined, a rush of many members came down, and the vote was taken of them who were present, of those who had heard a part, and even of those who had heard little or nothing.<sup>1</sup>

The questions of science, as well as of evidence and of law, submitted to those just and careful judges were often extremely intricate; the interests disposed of always in the last degree important. It is believed that the history of public abuse affords no parallel to this; and that the annals of human tyranny are without any precedent for the pertinacity with which under pretence of saving their privileges, the Commons insisted upon perpetuating such a vile system. Nor let it be thought that privilege is the only thing which enters into the minds of members in pursuing so unworthy a course. Worse motives, it is greatly to be feared, prevail. Constituents are desirous to have the friendly aid of their representative. A searching reform of this abuse, much more a surrender and a transfer of the powers, would be very unpopular. The constituent body feels an interest actual or possible in its being retained; worthy electors have, or they may have, Bills to pass, or to oppose; honourable members, unwilling or unable to grant favours or bestow largesses, may find it convenient to have a finer coin in which to pay the favours of those worthy electors. True, you may order that no one shall sit on a Committee which deals with a Bill from the place he represents; but one member may oblige another to-day by attending and voting, and be obliged in his turn by like attendance and like votes to-morrow. That more direct influence has been applied on the minds of honourable members than the mere wishes of worthy electors has been openly and positively asserted. That shares have been occasionally distributed in concerns upon trial; that in no

<sup>1</sup> It will be seen that this article has been written without reference to the recent alterations which have been made in committees of the House of Commons, some account of which is given in a subsequent article. See Art. IV.

other way could the recorded attendance of certain members be explained, has been openly and positively affirmed. We venerate too highly the awful authority of Parliament to suppose such things even possible—at least in the existing Parliament; nay, even could we name the part of the country from which the honourable persons in question came, or could we indicate the individual peer whose assent had been by such means had and obtained, we should feel it a matter of prudence, if not of conscience, to hold our peace, and the rather because the argument we use does not require any such support. The possibility of such things is quite sufficient; and, besides, were all impurity of this kind wiped out from the tribunal we are describing, quite enough remains, from which it never can be purged.

We may then safely, and with all due respect, venture to pronounce the Parliamentary Committees, especially those of the Commons' House, to be for every purpose except that of legislative inquiry, and the exercise of inquisitorial functions, but more particularly for the judicial or quasi-judicial business which they now transact, by very far the worst tribunal that ever assumed to exercise those high functions, many of which, indeed, are peculiar to it, and were never exercised by any other, even the best constituted tribunal. In this judicature are united, and in great perfection, all the defects and all the vices which a judicial or a quasi-judicial body can exhibit; varying numbers, fluctuating composition, want of all responsibility, individual or collective; inexperience in business; ignorance of law, and want of regularity and discipline; sympathy with mob feelings; openness to undue influence; want of care, and industry, and attention; connection with the parties; not seldom interest in the matter submitted to decision; utter carelessness of the authority of other determinations, or consistency in their own. To remedy these evils is impossible; no change of a subordinate kind, no correction can effectually mend the scheme: one only remedy can effect this object — *una litura potest*.

Nevertheless, oppressed by the sight of the business cast upon them, and desirous to avoid a part of the toil, rather than mistrusting their capacity to discharge their duties, they have, of late, had recourse to a somewhat singular contrivance, which has, naturally enough, drawn the attention of the

country, and has been already made the subject of some discussion in Parliament. A resolution of the Commons last session purported to declare the wish that the Board of Trade should examine the different Railway schemes previous to their coming before Parliament in the shape of bills, and for this purpose a standing order was made of both Houses requiring a duplicate of each plan to be lodged with the Board at the same time that others are lodged in the parliament office. No act was passed on this subject. No authority whatever was given to the Board, either to call parties before it, or to examine witnesses. But upon this parliamentary hint the Board proceeded, and have acted in a manner somewhat anomalous, considering the subject matter of its deliberations, and the purpose to which these were to be made subservient. The use of this preliminary examination is averred to be the giving help to the committees before whom the bills shall come, that is to say, to give an opinion the result of their inquiries, by which opinion the labours of the committees may be abridged. Now it is manifest that this can only be effected in two ways, by lessening the number of railway bills, that is, causing some schemes to be abandoned, and by giving such an opinion on those which are persevered in as may help, that is to say, guide the committees. It must of necessity be in one or other or both of these ways alone, that the plan can have any effect, and the only way in which the committees can be aided by having their own labour spared by the Board, is that they shall adopt the Board's opinion, and adopt it on the Board's authority. For if the committees are themselves to inquire, of what possible use or help to them is the previous inquiry of the Board? This was at first attempted to be denied, and it was said that the committees are free to agree with the Board or to differ. No doubt they are, but then how can they derive any help from the Board? It is only by regarding the decision previously come to as all but binding, and thus assuming it to be right, that the least saving of trouble, the least aid can be given to the committees. Accordingly, Lord Stanley, in the House of Lords, admitted that in almost every instance the opinion of the Board would prove conclusive; but then he said that it would so prove, not by the weight of authority, but by the merits of the case, for, said his

Lordship, the committees will always agree with the Board only because they will be aware of the Board always being right. If so, what use is there in the form of the committee deciding at all, if they are only to register the edicts of the Board? The Board being infallible and impeccable might be taken for the judge in the last as well as in the first instance, and much trouble, delay, and expense be saved.

Here, before examining the constitution of this body, let us only stop to mark the singular spectacle afforded by the House of Commons, so jealous of its privileges, allowing another body wholly unconnected with it to sit in judgment, and in previous judgment, upon some of the most important matters submitted to its consideration. When any one has at any time ventured to suggest that the more difficult questions of law, and the nicer matters of evidence, had better not be disposed of by election or other committee, but be examined and reported upon by men whose habits are those of lawyers, and who can be biassed by no party or personal interests; a cry, nay, a shout of indignation and of scorn has been raised, and the hapless proposer of so abominable an innovation has been all but committed for an attack upon the sacred privileges of Parliament. Even when the proposition has been only that some fit tribunal should examine and report to aid the deliberations of the unfit committee; this made no kind of difference, and the notion was deemed too wild to be even contested. Yet, now we find the House of Commons tamely acquiescing in a member of the Government belonging to the Lords, and four engineers of his own appointment, constituting themselves a committee like the Lords of the *Articles* in the Scottish Parliament, and deciding beforehand what bills shall and what shall not come before the Commons.

We say deciding, for substantially it is a decision. Not only has its great weight been shown as necessary to be assumed, else there is no use whatever in the arrangement — not only has it been proved that, as a matter of course, the decision will be adopted by the committees,—but the Government have avowed their expectations and their belief that such must be the course. Nor is this all; the share market indicates a most perfect coincidence of opinion between the parties and the public and the government on this point, and

no better test can be resorted to than one which consists in the free play of the whole interest concerned, and is manifested in pounds, shillings, and pence. As soon as the opinion of the Board is made known, the stock rises 20 or 30 per cent. of the scheme approved; it falls as much or nearly as much of the scheme rejected.<sup>1</sup> The Board has only to express an opinion that such a railway ought to be abandoned, no one will touch it; only to express an opinion that such a scheme alone ought to be persevered in, and all men run after it.

The statement of Lord Dalhousie, indeed, chief of this Board, is decisive of this matter. He described, at great length, the precautions taken to prevent any hint escaping, of the Board's opinion, before it was promulgated in the Gazette to all the world. He declared how no secretary or clerk was employed to write or to copy; how even a peculiar box and lock were used to keep the papers; how special functionaries acted as confidential messengers to bear the reports; how the moment of sending to the Gazette Office was cunningly chosen and curiously adjusted to the closing of the Stock Exchange. All this, of course, demonstrates that the resolutions of the Board are regarded as decisive, and that the expectation is throughout that its decisions will be binding on Parliament in fact, though of course the right, never to be exercised, will remain to disregard them.

Let us now for a moment ask, how this secret tribunal is framed, and how it proceeds, always bearing in mind, first, that its deliberations and the opinions to which they tend are solely intended to aid Parliament in its labours, and secondly that its judgments have the unquestioned power of raising or lowering the value of property to an immense amount, that it disposes by a word of millions of money, and affects other interests, of which no money can estimate the importance.

The President of the Board of Trade is the head of this Invisible Tribunal, and we will suppose him to be ever so experienced a statesman, ever so sage a lawyer, ever so practised a judge. There is no quality of nature, no acquirement of study, no fruit of experience, which we will not suppose him to possess in the most ample measure. We shall even

<sup>1</sup> A rise of 3 on 7 premium is 40 per cent.; but a rise of 13 per share on 30 price is 30 per cent.

adorn him with perfect grace of demeanour, and imagine his manner void of all offence; meaning always that he shall still be a man and not a divinity, that he shall still be able only to judge by the statements and the proofs laid before him, and that he shall have no faculty of omniscience and of prescience more than ordinary mortals, to which class even he belongs. To him are added four engineers, civil or military, named by him or by his colleagues in the Government.

On this Board, there is no lawyer, no man experienced as a judge, no man of large civil experience of any kind, and they are armed with no power whatever, except to look at plans, to hear the propounders of them, and to report. They can neither send for witnesses, nor swear them if they attend themselves; therefore they examine no evidence, but make up their minds and decide upon the statements of the parties themselves. This, at least, is what they profess to do. But nothing is more certain than the restless, uneasy efforts of men required to judge while you shut out evidence — called upon to act, as if they saw, while you keep them blindfold — desired to give opinions, yet prevented from collecting the materials on which they must be formed. They will make violent efforts to shift aside the bandage from their eyes, and will see confusedly; they will let in the light by an unfair and a forbidden aperture; they will ground their opinions on illicit materials. Required to make bricks, and forbidden the use of straw, there is nothing they wont do to glean and gather it. The Board is sure to receive suggestions from its members, either according to what they have observed themselves; or fancied without actual observation, or heard from others — observed, fancied, heard, without the presence of the parties. They are expected and required to hear each party behind the other's back. They are sure to hear many things from others in the absence of both parties; and this is to be the course of inquiry, and on such investigation as this, the report of the Board is to be framed, and a report thus prepared is to determine the value of all men's property, being published in the Gazette, and, to guide the legislature, being presented to both Houses of Parliament!

We again must recur to the ground upon which it is said

this Board is established; the purpose which its labours and its reports are to serve. They are to be a help for the Committees of Parliament. That is to say, five gentlemen not suffered to examine any evidence at all, are to help the Committees to an opinion framed in the dark, those Committees being not only allowed, but required to examine all the evidence which both parties choose to produce. Surely, never since judicatures or legislatures were in existence, was any thing equal to this struck out in the real proceedings of any actually existing community. It is, positively, surpassed by nothing in the "*Voyage to Laputa*." As we should in vain seek for a parallel among the nations of Europe, let us try if we can find any thing to come near the scheme in those curious and authentic travels. "In the school of political projectors," (says the late Captain Gulliver) "I was but ill entertained, its professors appearing, in my judgment, wholly out of their senses, which is a scene that never fails to make me melancholy. These unhappy people were proposing schemes for persuading monarchs to choose favourites upon the score of their wisdom, capacity, and virtue, with many other wild and impossible chimeras that never entered before into the heart of man to conceive. But, however, I shall so far do justice to this part of the academy as to acknowledge that all of them were not so visionary. There was a most ingenious doctor who seemed to be perfectly versed in the whole nature and system of government. This illustrious person considered that every senator in the great council of a nation, after he had delivered his opinion and argued in the defence of it, should be obliged to give his vote directly contrary, because if that were done, the result would, infallibly, terminate in the good of the public."—*A Voyage to Laputa*, ch. vi.

We have been favoured by the captain's family with a sight of his original MS., in which we find some notable passages that have been suppressed as being conceived to go too far beyond all bounds of credibility. Among these suppressed passages we find the following, of which we have our suspicions, indeed, we have reason to believe, though we might not be able to bring the charge of plagiarism home, that the worthy president of the Board of Trade had managed to

obtain a sight while framing the existing Railway "Code of Procedure." "Another contrivance," says the gallant officer (not Captain O'Brien, but Captain Gulliver), "seemed to be exceedingly original, and to show a truly inventive genius. The Grand *Hox* (*i. e.* senate), and, indeed, the Courts of Law too, being much oppressed with the many important matters that came constantly before them, had fallen upon a way of relieving themselves from almost all labour, and thus saving their time for trifling matters which they could not delegate to others. Every plan of any moment and any cause of value was carried, in the first instance, before a select body, called in the Laputa tongue, *Hom-bog*, (which means what we term Board) of five persons of great honesty and little other merit, appointed by the prince, and these, to save time, were strictly forbidden to examine the matters, which would have been quite endless, but they were ordered to decide at once, each of the five forming his own opinion, either by drawing lots, or in any other summary and convenient way; but though, generally, on this account differing, they were to declare, in their report, that they all agreed; and their *unanimous* decisions being first published to the world, were sent to the senate. That very respectable body was bound to adopt them in every particular; but in case the parties to the proceedings might complain of not having been heard, they were allowed to have as many counsel, and examine as many witnesses, as they pleased, *after* the senate had decided, these speeches and depositions being taken by a small portion called the Little Hox (or Committee), and the papers and documents were then burnt to save room in the building. It was found that incredible comfort and satisfaction was afforded to the parties by this vent being given to their cases, and still more pleasure was afforded to their counsel and agents, while the public business was expedited incalculably by so wise and practical a contrivance."

We venture to doubt the soundness of the discretion exercised by the worthy author in suppressing so useful a passage, and are glad to have the opportunity of restoring it. Certain we are that it is not more incredible than the other invention, which it is surmised the noble chairman thinks of



propounding next session, should he find his present plan to fail — we mean the one given by the Captain in his published work at full length, and upon which it is reported that Captain O'Brien (assisted by Captain Warner and other able projectors) is now working at his few leisure hours, as it will require some adjustment and adaptation to the circumstances of this country: we mean the plan of securing parliamentary unanimity by sawing the heads of the members. The difficulty of procuring instruments of sufficient power to perform this most useful operation is said to have been the most formidable obstacle; but that has been removed by the extraordinary power of one of the newly-constructed steam-engines, which is found capable of sawing through iron or brass of great thickness and toughness, and may possibly therefore be able to penetrate the obdurate and thick bones in question.

But as the noble Chief of the Board (we mean our English Board, not the Laputan Hom-bog), coming from the highly literal country of Scotland, is very likely to take issue with us, and to deny with much asseveration his having borrowed any thing from the illustrious Traveller, (whether or not he is really engaged in the new saw-and-patch plan, he of course cannot be expected decorously to communicate), therefore we must e'en come back to the subject after the manner which may best suit his taste. Then we intreat him for a moment to consider in what position he places the parties between whom the Board decides in ignorance of their case, as well as the Committees whom it admits to a share of its own "outer darkness," by way of helping them. The plan A is affirmed without proof; the plan B without proof rejected. The B people are ready to disprove all the assertions of the A folks; and to show that the plan is by far the best, "Go, if you please (nay, if you dare), says the Board, before a Committee." Before a committee they go — but they find that the A people have the decision of the Board in their favour, have obtained the ear of the committee, and thus got possession of the field, so that the case B is altogether desperate. As for the committee, unless they feel bound by the decision come to in the dark, the whole scheme necessarily fails to give them the least help.

We marvel that this scheme should be confined to Railways and to Bills. Why may not many matters, instead of occupying some days' debate, be referred to the Board of Trade; or whatever board the subject properly belongs to? The Corn Laws, at least, might be so dealt with; unless, indeed, another plan, to be found in the same travels, were adopted, that of requiring all the speakers to go on at once, and calling a vote at the end of their joint and several speech. But why confine these salutary inquiries and contrivances for saving time and trouble to Parliament? We know how oppressed with business our courts of law always are. Has it never occurred to the Chancellor and the Chief Justices that they might make a "*Regula Generalis*" a wholesome Rule of Practice, sending all causes in the first instance before any four or five eminent persons of great respectability and no experience, who, without wasting time to inquire, except by hearing the parties, might report to their respective courts in each cause, it being understood that from respect to those excellent individuals, and to their own ease and comfort, and the value of the public time, it must be a mighty strong case indeed which should induce the Courts to adopt a different decision from that come to by those eminent, though unenlightened, assessors, especially if one or more of them should happen to be also excellent officers, and to have served in the Peninsula under the Duke.

Much reliance has been placed upon the perfect secrecy with which these proceedings of the Invisible Tribunal are carried on. That the impenetrable veil, however, is occasionally pierced, we have seen good reason to suspect, for Lord Brougham stated the division on a very much contested case to have been two to two, and he named the voters. There was no confession made, but there was no denial given to this statement; and it is universally believed to be true. Assuredly, had it been otherwise, the victory over an assailant never would have been shunned by the Board. Nevertheless the rule is, that all decisions are signed, and are reported as unanimous; yet those decisions are to have weight only as the opinions of the members composing the Board. Then does any man pretend to think that it will make no difference in the opinion of the Committees when they come to consider

the Board's Reports, whether all the five join in the recommendation, or two are of one opinion, and two of the contrary opinion? Surely this plan is framed with the direct and unavoidable effect of deception, whatever might be the design of its promoters. As for the answer made in Parliament when this objection was taken, that the Admiralty and the Treasury all adopt a like course in their ordinary warrants, can any thing be more perfectly futile? Who is so dull as not to perceive the difference between merely executive orders, whose weight and authority depends in no degree upon the opinions of those that issue them, and decisions whose whole authority is derived from the opinions of the persons that pronounce them? Do not all reports of our cases in the courts carefully denote whether the judgment is unanimous or not; and who dissented from it? For why? Because though the particular case is as much decided by a majority as by the whole Bench, yet its weight as an authority to rule other cases (which is the matter now in hand of the Board and the Committees) depends very much upon the numbers and even the individuals by whom the decision was pronounced.

Last of all, we come to the abuse — the possibility of abuse — and that is enough. We find 204 shares bought a short time before the decision in one case, and bought by the nearest relative of a member of the Board. Their value rose exceedingly immediately that the decision was pronounced. No one believes that undue knowledge was conveyed; yet all are aware that men in familiar conversation naturally express their opinions, and that acute observers may draw the conclusion. At any rate, every one knows that no law whatever prohibits or punishes such disclosures. The members of the Board, except the chairman, are in no responsible situation; they are not even bound by an oath of office; they are not ministers, they are not privy councillors. Why may not all the benefit of their skill and knowledge be obtained by examining them as witnesses? Why must they in such important and such delicate matters be made judges? The Tribunal is secret — why, then, must its members be irresponsible?

But our objection is to the whole scheme, not to taking any portion or every portion of the Private Bill business from the Commons, and vesting it in a body capable of

administering it faithfully and well, but the superadding to an incapable body another incomparably less capable, the affecting to assist Parliament by a preliminary inquiry from which all useful light is excluded. All objections to the particular character of this body are of very subordinate moment.

A defender, indeed, of this system, though not of this structure, has unexpectedly appeared in the respected person of Lord Fitzwilliam. He is grateful for this boon conferred upon the country by the Government. But his notions are somewhat peculiar, not to say fantastical. He holds that the Board's decision should be final and irreversible, when it rejects any scheme, but that when it recommends one, the parties for and against should be allowed to petition Parliament, and heard fully before that tribunal. We need only ask his Lordship how he would relish such a scheme, were it applied to any suit which he might try for the recovery of a lost right. How would he like to be turned round and defeated by an officer of the court who had heard all that he chose to say, without any proof, but had also heard, without any proof, all the statements of his adversary, with an appeal from the officer to the court, if the decision was for him, but no appeal from that officer, if he decided for his adversary, all whose statements his Lordship might be prepared with evidence to refute? We believe, we need say no more on this strange addition, more wild by a good deal than the scheme to which it has been appended.

We trust the reader will excuse the length to which the great importance of the subject has carried us on the present occasion. We feel most anxious for the honour as well as the interests of our country, and, above all, solicitous that nothing should tarnish the high reputation, the hitherto undimmed lustre of our best, our proudest institutions, those connected with the security of private rights, and the preventing of injustice. All the rest of our polity is as a trifle compared with this, and when once, under whatever pretence, the Legislature shall sanction a rash, a careless, or a corrupt dealing with the rights of property on whatever scale, but far more if on the largest scale, we may be well assured that the glory has departed from our whole system.

## ART. II.—OF THE FUNCTIONS OF THE JUDGE AS DISTINGUISHED FROM THOSE OF THE JURY.<sup>1</sup>

LORD HARDWICKE has observed, and all reflecting men will agree in the observation, that “it is of the greatest importance to the law of England, and to the subject, that the powers of the judge and jury be kept distinct<sup>2</sup> ;” yet important as this object undoubtedly is, it is one which, even at the present day, is not very perfectly effected. The general principle, that the judge must determine the law and the jury the fact, is not, and cannot be, disputed<sup>3</sup> ; but in the application

<sup>1</sup> This subject has already, to some extent, engaged our attention. See 1 L. R. art. III. p. 37. It is proper to state, that the above article is by another writer. — Ed.

<sup>2</sup> R. v. Poole, Cas. Tem. Hard. 28.

<sup>3</sup> In the case of R. v. The Dean of St. Asaph, Lord Mansfield declared, “that the fundamental definition of trial by jury depended upon the universal maxim, *ad questionem juris non respondent juratores; ad questionem facti non respondent iudices* ;” and his lordship added, “Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court; where, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law; they are not sworn to decide the law; they are not required to decide the law. \* \* \* It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.” 21 How. St. Tr. 1039, 1040. So, in an elaborate essay on this subject, published by Mr. Hargrave as a note to 1 Co. Lit. 155 b., the learned author states the result to be “that the *immediate* and *direct* right of deciding upon questions of law is entrusted to the judges; that in a jury it is only *incidental*; that, in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore, that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges.” In America, the same principles have been lately expounded in forcible language by Mr. Justice Story. “Before I proceed,” said he, “to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. His argument

of this principle at *Nisi Prius*, embarrassing questions not infrequently arise, from the experienced difficulty of defining with clearness the obscure and shifting boundaries of law and fact. In the present article it is proposed briefly to discuss this subject, and to lay down such general rules as may practically be of use, in distinguishing the relative duties of judges and jurors.

The duty of a judge presiding at *Nisi Prius* or in the Crown Court, is threefold: first, he must decide all questions respecting the admissibility of evidence; secondly, he must instruct the jury in the rules of law, by which the evidence, when ad-

is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of Not guilty, than they are in every civil case, tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each, they must necessarily determine the law as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought that a jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion." *U. S. v. Battiste*, 2 Sumn. 243. See further on this interesting subject, 2 *Wynne's Eunomus*; *Bushell's case*, 6 How. St. Tr. 999. 1008. 1013, 1014.; *Vaughan's R.* 135. S. C.; *Franeklin's case*, 17 How. St. Tr. 625.; and *R. v. Woodfall*, 5 Burr. 2661.

mitted, is to be weighed; and lastly, he must explain to them those general principles of law, that are applicable to the point at issue.<sup>1</sup> In discharging the first duty, it frequently happens that the admissibility of a witness or an instrument is found to depend on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the judge, and adjudicated on by him *alone*.<sup>2</sup> Thus, for example, if the question be whether a confession should be excluded on account of some previous threat or promise, the judge must decide, first, whether the threat or promise was really made, and secondly, whether, if made, it was sufficient in law to warrant the exclusion of the evidence.<sup>3</sup> So, if a dying declaration be tendered in evidence, and its admissibility rest upon the fact that the deceased believed, when he made it, that he was at the point of death, the question whether this fact be satisfactorily proved must be determined by the judge.<sup>4</sup> In like manner, if the question be whether a document has been duly executed, or stamped<sup>5</sup>; or whether it comes from the right custody<sup>6</sup>; or whether sufficient search has been made for it, so as to admit secondary evidence of its contents<sup>7</sup>; or if a witness be objected to, on the ground of infidelity, or imbecility of mind, or as being himself a party to the cause;—

<sup>1</sup> Among the questions propounded by the Irish parliament to the judges of that country in 1641, was one, "whether the judge or jurors ought to be judge of the matter in fact," to which the judges replied that "although the jurors be the sole judges of matter of fact, yet the judges of the court are judges of the *validity of the evidence*, and of the *matters of law arising out of the same*, wherein the jury ought to be guided by them." 2 Nalson's Coll. of State Pap. 575. 582. Lond. 1683.

<sup>2</sup> *Bartlett v. Smith*, 11 M. & W. 486.

<sup>3</sup> See 1 Stark. R. 523. n. (b)

<sup>4</sup> So resolved by all the judges, in two cases, cited by Parke B. in *Bartlett v. Smith*, 11 M. & W. 486.; and in one case cited by Ld. Ellenborough, in *R. v. Hucks*, 1 Stark. R. 523. These cases virtually overrule *R. v. Woodcock*, where the question was left to the jury by Eyre C. B.

<sup>5</sup> *Bartlett v. Smith*, 11 M. & W. 483. In that case, a bill, purporting to be a foreign bill, and stamped accordingly, was objected to on the ground that it was in fact an inland bill, and evidence was offered to prove this fact. Held, that the judge ought to have received the evidence at the time the objection was made, and decided himself upon the admissibility of the instrument; and as he had submitted it, as part of the defendant's case, to the jury, a new trial was granted.

<sup>6</sup> *Bp. of Meath v. Marq. of Winchester*, 3 Bing. New Ca. 198.; *Rees v. Walters*, 3 M. & W. 531, 532. per Parke B.

<sup>7</sup> 11 M. & W. 486., per Alderson B.

in all these and the like cases, the preliminary question of admissibility must, in the first instance, be exclusively decided by the judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses, in order to arrive at a just conclusion. So where evidence is offered of acts done in places other than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in these different parts, as to render evidence, affecting the one, admissible with reference to the other; and he will further be called upon to pronounce, whether the acts relied on amount to evidence of ownership.<sup>1</sup> In a recent case<sup>2</sup>, witnesses were called to prove a general usage in trade, but as their testimony was subsequently considered by the judge as amounting to no more than evidence of opinion, it was withdrawn by him from the consideration of the jury, and the Court supported his ruling. It was there laid down as a distinct principle, that when the evidence was by law admissible for the determination of the point raised, the judge was bound to lay it before the jury; but whether the evidence was admissible or not, was a matter for the decision of the judge alone. In all these cases, however, after the evidence has been finally admitted, its credibility and weight are entirely questions for the jury, who are at liberty, as it seems, to consider all the circumstances of the case, including those already proved before the judge, and to give the evidence only such credit as, upon the whole, they may think it deserves.<sup>3</sup> The judge only decides, whether there is, *prima facie*, any reason for presenting it at all to the jury.

Secondly, it is the duty of the judge to point out to the jury any rule of law, which either renders evidence unnecessary, or gives peculiar weight to any particular species of evidence, or defines the manner in which a certain fact must be proved. Thus, he should distinctly explain the nature of any presumptions, which may apply to the point at issue, distinguishing such as are conclusive, from those which are liable to be rebutted by counter-evidence; and again dividing

<sup>1</sup> Doe v. Kemp, 7 Bing. 336., per Bosanquet J.

<sup>2</sup> Lewis v. Marshall, C. P. 29th June, 1844.

<sup>3</sup> Ross v. Gould, 5 Greenl. 204.



this latter class, into those presumptions, upon which the jury are bound to act, in the absence of conflicting testimony, and those, upon which it is expedient or allowable to rely. So, if by the common or statute law, any document, when proved, becomes conclusive evidence of the facts stated therein, it is the province of the judge to point out to the jury that the existence of such facts cannot be disputed or denied, and that the only question for their deliberation, is whether or not the document be duly proved. So, if the uncorroborated testimony of a single witness be insufficient by law to establish guilt, as for instance in charges of treason or perjury, the judge must acquaint the jury with the nature and extent of this rule; and even where a conviction founded upon such testimony would be strictly legal, as in the case of an accomplice becoming witness for the Crown, the judge would not properly discharge his duty, if he did not warn the jury against the danger of placing implicit reliance upon statements coming from such a suspicious quarter. Many judges indeed, and those of the greatest ability, have not confined their observations within these limits, but have boldly given their opinions respecting matters of fact; and although this mode of proceeding, when adopted, as it sometimes has been, in a supercilious spirit, may arouse the jealous feelings of a jury, and may excite them, in their anxiety to prove their independence, to pronounce an unjust verdict<sup>1</sup>; yet, it may well be doubted, whether, in the great majority of instances, it would not promote the real interests of justice, if the judge were temperately to state to the jury what opinions he had formed respecting the merits of the case, and the mode by which he had arrived at his conclusions. The jury would still have the undisputed power of deciding the question as they thought fit, but they would have the advantage of being advised by a man, no more liable than themselves to prejudice or partiality, whose long experience in courts of justice must, of necessity, have rendered him far more competent than they can be, to unravel the tangled threads of conflicting testimony. The too com-

<sup>1</sup> "Few things incite me more to repel a doctrine than intolerant attempts to force it on my understanding."—*Dr. Channing*, vol. iii. p. 319. Lord Bacon, in his advice to Mr. Justice Hutton, says, "You should be a light to jurors to open their eyes, but not a guide to lead them by the noses."—*Bac. Works*, vol. vii. p. 271. ed. Montagu.

mon mode of summing up—"Gentlemen, if you think so and so, you will find for the plaintiff; if you think otherwise, you will find for the defendant; gentlemen, the question is for you,"—though sanctioned by the practice of many able, but somewhat lazy judges, and though possibly in accordance with the strict theory of a trial by jury, is but little calculated to promote the attainment of truth; and in complicated cases before a petty jury, is almost tantamount, if not to a direct denial of justice, at least to a decision of the issue by lot.

Lastly, the judge must explain to the jury what principles of law are applicable to the point in issue, and in order to enable him to do so correctly, must distinguish questions of law from questions of fact. This, in ordinary cases, is no difficult task. Thus, for instance, on a charge of larceny, the judge lays down, as a general proposition of law, that all persons who take and remove the personal chattels of another without his consent, and with a felonious intent, are guilty of that crime, and then, according to the circumstances of the case, he explains, with more or less particularity, what constitutes a taking, removing, &c. These, obviously, are questions of law, and together form the major premiss of the syllogism. The jury next decide, whether the evidence proves that the goods have been taken and removed in such a manner, and with such an intent, as the judge has previously shown will amount to larceny. These are questions of fact, and together form the minor premiss. Lastly, comes the conclusion of guilt or innocence, which may either be drawn by the jury applying to the facts which *they* find, the rules of law as interpreted by the judge; or, in the event of their considering the task too difficult for them, they are at liberty to find the facts specially, but not the *mere evidence* on which the facts are founded<sup>1</sup>, leaving the Court to apply the law to such facts, and consequently to pronounce the final decision. But simple as this process appears to be, there are a certain class of cases, in which the line between law and fact has been very indistinctly drawn, and consequently the

<sup>1</sup> Hubbard v. Johnstone, 3 Taunt. 209., per Wood B.; Harwood v. Goodright, 1 Cowp. 91, 92., per Ld. Mansfield; Mires v. Solebay, 2 Mod. 244, 245.; 1 St. Ev. 511, 512.

respective duties of the judge and jury are not yet clearly defined. For instance, if the question be whether a certain party had probable cause for doing an act, or whether he has done an act within a reasonable time, or with due diligence, it is difficult to say whether the definition of what constitutes probable cause, reasonable time, or due diligence, be for the judge or the jury, and specious arguments will not be wanting in favour of the claims of either party. On the one hand, it may be said, that these terms are as capable of judicial interpretation, as the words conversion, or asportation, which must clearly be explained by the judge; while, on the other hand, it may be urged, that they seem rather addressed to the practical experience of practical men, than to the legal knowledge of the mere lawyer; that being terms of degree, their meaning is subject to indefinite fluctuation, according to the varying circumstances of each particular case, and consequently, they defy all attempts to compass them within exact *à priori* definitions. In truth, they are neither matters of fact, nor matters of law, exclusively, but are rather matters of quality or opinion, which, for want of a more appropriate name, have been generally termed "mixed cases." They form, in logical phrase, the middle term, and are alike common to both the premises, which are respectively entrusted to the judge and jury, and upon which the ultimate decision must proceed.<sup>1</sup>

Having said thus much respecting the general nature of this class of cases, it remains to be seen what decisions have been reported on the subject; and although some of these will be found to rest rather on arbitrary authority than on any definite principle of law, it is hoped that their collection and partial classification may be of some service to the profession, the more especially as precedents have ever been considered in this country as deservedly entitled to respect and deference.

First, it is now clearly established, that the question of probable cause must be decided exclusively by the judge, and that the jury can only be permitted to find, whether the facts alleged in support of probability, and the inferences to

<sup>1</sup> See, on this difficult subject, 1 St. Ev. 512—526.

be drawn therefrom, really exist.<sup>1</sup> This rule is equally binding however numerous and complicated the facts and inferences may be<sup>2</sup>; for, although in some cases, it would doubtless be attended with great difficulty to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts, are made out to their satisfaction, yet the task is not impracticable; and it would obviously savour of gross inconsistency to hold that a rule, which is undisputed in a simple case, should not equally apply where the facts were complicated.<sup>3</sup> For where could the line be drawn, and who should determine what degree of complexity would transfer the burthen of decision from the judge to the jury? The difficulty, too, is more apparent than real, for it rarely happens but that there are some leading facts in each case, which present a broad distinction to the view, without having recourse to the less important circumstances<sup>4</sup>; and as the judge has a right to act upon all the uncontradicted facts, it is only where some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that he is called upon to submit any question to the jury.<sup>5</sup> Although the rule is as we have stated it, where, in an action

<sup>1</sup> *Michell v. Williams*, 11 M. & W. 205.; *Panton v. Williams*, 2 Q. B. 169.; 1 G. & D. 504. S. C.; *Sutton v. Johnstone*, 1 T. R. 493. 510. 544, 545. 547. 784.; 1 Br. P. C. 76., 2d ed. S. C. in Dom. Proc.; *Mitchell v. Jenkins*, 5 B. & Ad. 594—596.

<sup>2</sup> In *Panton v. Williams*, 2 Q. B. 192., Tindal C. J. observes, "Upon this bill of exceptions, we take the broad question between the parties to be this; whether, in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, that, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge? And we are all of opinion that it is the duty of the judge so to do."

<sup>3</sup> *Panton v. Williams*, 2 Q. B. 194, 195., per Tindal C. J., pronouncing the judgment of the Ex. Ch.

<sup>4</sup> *Id.*

<sup>5</sup> *Michell v. Williams*, 216, 217., per Alderson B.

on the case for malicious prosecution, the question of probable cause arises, it seems to have been held both in England and Ireland, that in an action of trespass, the *reasonableness of a suspicion* upon which a party acts in causing an arrest, or in detaining goods, is a question which the jury may be called upon to decide.<sup>1</sup> As these decisions appear to be at variance with the late case of *Panton v. Williams*, for it is submitted that no sensible distinction can be taken between questions of reasonable suspicion and those of probable cause, it may admit of a serious doubt, whether they would be considered as binding authorities at the present day.

The question of *reasonable time* is open to more doubt than that of probable cause. With respect to some subjects indeed, which from their frequent recurrence admit of the adoption of precise rules, as to what constitutes reasonable time, the courts, for the sake of commercial convenience, have laid down such rules; and in these cases, the duty of the jury is clearly confined to the simple task of ascertaining whether the facts proved fall within the rules or not. Thus, notice of dishonour of a bill of exchange must be given within a reasonable time, and this has been held by the judges to mean, according as the parties live in the same, or in different, places, either that the letter, containing notice, should be so posted, that in the due course of delivery, it would arrive on the day following that when the writer receives intelligence of dishonour<sup>2</sup>, or that such letter should be posted before the departure of the mail on the day following the receipt of intelligence<sup>3</sup>; or if there be no post on that day<sup>4</sup>, or if it start at an unseasonable hour in the morning<sup>5</sup>, then the writer shall have an additional day. So, the holder of a cheque, or of a bill or note, payable on demand,

<sup>1</sup> *Wedge v. Berkeley*, 6 A. & E. 663.; 1 N. & P. 665. S. C.; *Annett v. Osborne*, 2 Jebb & Sy. 376.

<sup>2</sup> *Stocken v. Collin*, 7 M. & W. 515.; *Smith v. Mullett*, 2 Camp. 208., per Ld. Ellenborough; *Hilton v. Fairclough*, id. 633., per Lawrence J.

<sup>3</sup> *Williams v. Smith*, 2 B. & A. 496. See *Shelton v. Braithwaite*, 7 M. & W. 436.

<sup>4</sup> *Geill v. Jeremy*, M. & M. 61., per Ld. Tenterden.

<sup>5</sup> *Hawkes v. Salter*, 4 Bing. 715.; 1 M. & P. 750., S. C.; *Bray v. Hadwen*, 5 M. & Sel. 68.; *Wright v. Shawcross*, 2 B. & A. 501. n.

need not present the instrument for payment till the day following that on which it was received, for the judges have put this construction on the term "reasonable time," within which the instrument must be presented.<sup>1</sup> They have also, with respect to the presentment of bills for payment, taken upon themselves to decide, as a question of law, what constitutes reasonable hours, and have held, that if an instrument be payable at a banker's, it must be presented within banking hours<sup>2</sup>; if elsewhere, at any time when the drawee may be expected to be found at his place of residence or business, though it be as late as eight or nine o'clock in the evening.<sup>3</sup> In like manner, a reasonable notice to quit a tenancy has for centuries received a legal construction, as meaning a six months' notice<sup>4</sup>; and where the tenant holds different portions of the premises from different days, it has been further decided that the notice refers to the day of entry on the substantial subject of the holding.<sup>5</sup> So, in the case of domestic servants, a reasonable notice to quit, is a calendar month's warning.<sup>6</sup> In all these cases, the question, being decided by a precise rule of law, is entirely withdrawn from the consideration of the jury. Formerly the judges endeavoured to limit to a period of three days, the reasonable time, for which a suspected party might be committed for re-examination<sup>7</sup>; and, although it was afterwards held that no precise rule could be laid down on this subject, inasmuch as the length of time must vary according to the special circumstances of

<sup>1</sup> Rickford v. Ridge, 2 Camp. 539.; Boddington v. Schlencker, 4 B. & Ad. 752.; Moule v. Brown, 4 Bing. N. C. 266.

<sup>2</sup> Parker v. Gordon, 7 East, 385.; Elford v. Teed, 1 M. & Sel. 28.

<sup>3</sup> Wilkins v. Jadis, 2 B. & Ad. 188.; Jameson v. Swinton, 2 Taunt. 224.; Barclay v. Bailey, 2 Camp. 527., per Ld. Ellenborough. As to the delivery of goods within reasonable hours, see Hartup v. Macdonald, 2 M. & Gr. 395.

<sup>4</sup> Doe v. Spence, 6 East, 123., per Ld. Ellenborough.

<sup>5</sup> Doe v. Snowdon, 2 W. Bl. 1224.; Doe v. Spence, 6 East, 120.; Doe v. Watkins, 7 East, 551.; Doe v. Rhodes, 11 M. & W. 600. In this last case the question raised, but not decided, was, whether, where a tenant holds a farm from year to year, the land from the 2d of Feb., the house from the 1st of May, a notice to quit the whole, given half a year before the 2d of Feb. is sufficient to entitle the landlord to recover the whole in ejectment. The inclination of Lord Abinger's opinion appears to have been in support of the affirmative.

<sup>6</sup> Nowlan v. Ablett, 2 C. M. & R. 54.; Fawcett v. Cash, 5 B. & Ad. 904.; 3 N. & M. 177. S. C.

<sup>7</sup> Scavage v. Tatham, Cro. El. 829.

each case, and must depend upon the probability of obtaining further evidence, yet the better opinion seems to be that, as in the case of probable cause, the jury must ascertain the existence of the facts, leaving the court to determine, upon these facts, whether the time was reasonable or not.<sup>1</sup> On two occasions, indeed, in England, and on one in Ireland<sup>2</sup>, the entire question appears to have been submitted to the jury<sup>3</sup>, but the latter of the two English cases rested upon the authority of the former<sup>4</sup>, and in the former no objection was taken at *Nisi Prius* to the summing up of the judge, but on a subsequent motion in Banc, its correctness was questioned, and at the second trial, the course stated above was distinctly adopted.<sup>5</sup> So, in an action against a sheriff for an escape, the question whether the officer was guilty of unreasonable delay in taking the party arrested to prison, is one for the determination of the judge<sup>6</sup>; as also are the questions, whether an arrest has been countermanded within a reasonable time<sup>7</sup>, whether a witness has been served with a subpoena a reasonable time before the trial<sup>8</sup>, or whether an executor has had reasonable time to remove the goods from the testator's mansion.<sup>9</sup> It seems, also, that the judges are the proper parties to decide whether fines, customs, or services are reasonable<sup>10</sup>, as also whether deeds contain reasonable covenants or powers.<sup>11</sup> On the other hand it appears to have been held, that the questions, whether a crop has been left on the ground for a rea-

<sup>1</sup> *Davis v. Capper*, 10 B. & C. 28.; 5 M. & R. 59.; 4 C. & P. 134. S. C.

<sup>2</sup> *Gillman v. Connor*, 2 Jebb & Sy. 210.

<sup>3</sup> *Davis v. Capper*, 10 B. & C. 30., per Gaselee J.; *Cave v. Mountain*, 1 M. & Gr. 260., per Ld. Abinger; 1 Scott, N. R. 132. S. C.

<sup>4</sup> *Cave v. Mountain*, 269., per Tindal C. J., who adds that Ld. Abinger, who tried the cause, "was, under all the circumstances, satisfied with the verdict," and consequently the propriety of his leaving the question to the jury could not practically be questioned in the court above.

<sup>5</sup> *Davis v. Capper*, 4 C. & P. 134. (a), 138.; 10 B. & C. 33. 35, 36.

<sup>6</sup> *Benton v. Sutton*, 1 Bos. & Pul. 28., per Heath J.

<sup>7</sup> *Scheibel v. Fairbairn*, 1 B. & P. 388. Heath J. there held that the arrest ought to have been countermanded in the course of the day in which the debt was received.

<sup>8</sup> *Barber v. Wood*, 2 M. & Rob. 172., per Ld. Abinger.

<sup>9</sup> Co. Lit. s. 69., and p. 56. b.

<sup>10</sup> Co. Lit. 56. b; Id. 59. b; *Wilson v. Hoare*, 10 A. & E. 236.; *Bell v. Wardell*, Willes, 202.

<sup>11</sup> *Smith v. Doe dem. Jersey*, 2 B. & B. 592., per Abbott C. J.

reasonable time<sup>1</sup>, so as to enable the tithe-owner to compare the tithe set out with the remainder of the produce; whether the seller of railway shares has offered to transfer them within a reasonable time<sup>2</sup>; whether goods purchased by sample have been rejected<sup>3</sup>, or goods taken by distress have been sold<sup>4</sup>, within a reasonable time; whether a bill payable after sight has been presented<sup>5</sup>, or whether costs have been taxed, within such time<sup>6</sup>; are to be decided by the jury. In attempting to reconcile these conflicting decisions, it may perhaps be urged that these last-named questions turn upon the ordinary course of business or trade, and consequently relate to matters with which the jury are peculiarly acquainted; but whether this be a satisfactory solution of the difficulty, we do not here attempt to decide.

Questions of *reasonable skill or care, due diligence*, and *gross negligence*, must, in the great majority of instances, be determined by the jury, since the judges can rarely have materials which will enable them to decide such questions by rules of law. Thus, if an action be brought against a surgeon for negligence in the treatment of his patient<sup>7</sup>, or against a gratuitous bailee for gross carelessness in losing the property entrusted to his care<sup>8</sup>, or against a railway company for heedlessly permitting their locomotive engine to emit sparks, whereby agricultural produce in the vicinity of the railroad is burnt<sup>9</sup>, what law can possibly define, whether such and such conduct amounts to sufficient negligence on the part of the defendant to entitle the plaintiff to a verdict? In these, and the like cases, therefore, the question has usually been left entirely to the jury, and even where they have found a ver-

<sup>1</sup> *Facey v. Hurdorn*, 3 B. & C. 213.

<sup>2</sup> *Stewart v. Cauty*, 8 M. & W. 160.

<sup>3</sup> *Parker v. Palmer*, 4 B. & A. 387.

<sup>4</sup> *Pitt v. Shew*, 4 B. & A. 206.

<sup>5</sup> *Mullman v. D'Equino*, 2 H. Bl. 564.; *Fry v. Hill*, 7 Taunt. 397.

<sup>6</sup> *Burton v. Griffiths*, 11 M. & W. 817. In this case, there was an express traverse of reasonable time, and the judges above concurred with the finding of the jury.

<sup>7</sup> 2 A. & E. 261., per Taunton J.

<sup>8</sup> *Doorman v. Jenkins*, 2 A. & E. 256.; 4 N. & M. 170. S. C.

<sup>9</sup> *Aldridge v. Gt. Western R. Co.*, 3 M. & Gr. 515. 519.; 4 Scott, N. R. 156.; 1 Dowl. N. S. 157. S. C.; *Hammon v. South Eastern R. Co.*, *Maidstone Sp. Ass.* 1845, per Lord Denman, MS.



dict in opposition to the opinion of the presiding judge, the court has generally refused to grant a new trial.<sup>1</sup> In some cases, where the question relates to matters of legal practice, as, for instance, if a sheriff be charged with neglect of duty in not executing a writ, or if an attorney be sued for negligence in conducting an action, the judges would seem to be more competent than a jury, to decide whether the facts proved amount to a want of reasonable care; and perhaps, in such cases, the question would be for them<sup>2</sup>; though on more than one occasion, such questions have been treated as questions of fact, and have been left for the determination of the jury.<sup>3</sup>

The proper tribunal for deciding questions of *bona fides*<sup>4</sup>, *actual knowledge*<sup>5</sup>, *express malice*<sup>6</sup>, or *real intention*<sup>7</sup>, is the jury; but it must be borne in mind that the law will sometimes presume the existence of fraud, knowledge, malice, and intention, from the proof of other remote acts, and that, whenever these presumptions are embodied in rules of law, either the court will draw the inference without the aid of a jury, or the jury will be bound to follow the directions of the judge.

<sup>1</sup> Doorman v. Jenkins, 2 A. & E. 260—266., per Cur. commenting on, and explaining Shiells v. Blackburne, 1 H. Bl. 158.; Moore v. Mourgue, 2 Cowp. 479.

<sup>2</sup> 2 A. & E. 260, 261., per Taunton J. See Godefroy v. Dalton, 6 Bing. 460., where the judges decided that an attorney had not been guilty of such negligence, as would render him liable to an action. "The cases," said Tindal C. J., in pronouncing the judgment of the Court, "appear to establish in general, that the attorney is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in a higher branch of the profession of the law," p. 468.

<sup>3</sup> Reece v. Rigby, 4 B. & A. 202., per Abbott C. J.; Shilcock v. Passman, 7 C. & P. 292, 293., per Alderson B.; Bracey v. Carter, 12 A. & E. 376, 377.

<sup>4</sup> Wedge v. Berkeley, 6 A. & E. 663.; 1 N. & P. 665. S. C.; Moore v. Mourgue, 2 Cowp. 480.; Gray v. Dinnen, 2 Jebb & Sy. 265.

<sup>5</sup> Harratt v. Wise, 9 B. & C. 712.

<sup>6</sup> As in actions for malicious prosecution or arrest; Mitchell v. Jenkins, 5 B. & Ad. 588.; 1 Camp. 207. n. (a).

<sup>7</sup> Doe v. Wilson, 11 East, 56.; Powis v. Smith, 5 B. & A. 850.; Doe v. Batten, 1 Cowp. 243.; Zouch v. Willingale, 1 H. Bl. 312., per Gould and Wilson Js.

It seems that questions respecting permissive occupation<sup>1</sup>—the assent of an executor to a bequest<sup>2</sup>; the unsoundness of a horse<sup>3</sup>; the seaworthiness of a ship<sup>4</sup>; or the materiality of facts not communicated in effecting an insurance<sup>5</sup>, are for the jury, though the judge ought to take care that they are not misled by any thing that comes out in the evidence.<sup>6</sup> So, the jury must decide whether articles supplied to an infant be *necessaries*; but their decision is subject to the control of the court<sup>7</sup>, who have laid down, as general rules of law, first, that this question does not, in any degree, depend upon what allowance the infant may have received from his father, and may have misapplied<sup>8</sup>; secondly, that the articles must be *really useful*, and therefore that merely ornamental jewellery<sup>9</sup>, or luxurious confectionery<sup>10</sup>, are not necessaries; and thirdly, that if useful, they must be such as would be necessary and suitable to the degree and station in life of the infant.<sup>11</sup> In a late case, where the jury, in opposition to the opinion of the judge, found that the hiring of horses and gigs was necessary for an Oxford undergraduate, he being the younger son of a man of fortune, and keeping a horse of his own, the court set aside the verdict as perverse, and granted a new trial.<sup>12</sup>

It has been recently laid down as a general rule of law,

<sup>1</sup> Lessee of Phayre v. Fahy, Hayes & Jon. 128.; Jones v. Boland, 2 Jebb & Sy. 289.; but see Whiteacre v. Symonds, 10 East, 13.

<sup>2</sup> Mason v. Farnell, 12 M. & W. 674., even though "the question depends upon the careful and somewhat critical comparison of the terms of a deed, with the other circumstances and facts of the case," per Alderson B. id. 682., pronouncing the judgment of the court.

<sup>3</sup> See per Patteson J., in Baylis v. Lawrence, 11 A. & E. 926.

<sup>4</sup> Clifford v. Hunter, 3 C. & P. 16., per Ld. Tenterden; M. & M. 103. S. C.

<sup>5</sup> Rawlins v. Desborough, 2 M. & Rob. 328., per Ld. Denman.

<sup>6</sup> Per Lord Abinger, in Mackintosh v. Marshall, 11 M. & W. 126.

<sup>7</sup> Harrison v. Fane, 1 M. & Gr. 553., per Tindal C. J.

<sup>8</sup> Burghart v. Hall, 4 M. & W. 727.; Peters v. Fleming, 6 M. & W. 46.

<sup>9</sup> Peters v. Fleming, 6 M. & W. 47, 48., per Parke and Alderson Bs. In that case it was held to be properly left to the jury, whether a watch and gold chain were necessaries for an undergraduate. The jury found that they were necessaries.

<sup>10</sup> Brooker v. Scott, 11 M. & W. 67.

<sup>11</sup> Peters v. Fleming, 6 M. & W. 42.

<sup>12</sup> Harrison v. Fane, 1 M. & Gr. 550.

that “*the construction of all written documents,*” which it is presumed would necessarily include acts of parliament, judicial records, deeds, wills, agreements, or letters, “belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when these words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot in any way be effectually set right.”<sup>1</sup> Thus, the court will construe the specification of a patent, though the interpretation of such an instrument, relating as it does to matters of science and skill, would seem peculiarly adapted to the practical information of jurors<sup>2</sup>; and where a contract for the sale of barley was attempted to be proved by letters, one of which offered *good* barley, and the other accepted the offer, “expecting you will give us *fine* barley and good weight,” the court held, that though the jury might be asked as to the mercantile meaning of the words “good” and “fine,” yet, having found that there was a distinction between them, they could not further decide that the parties did not misunderstand each other, but were bound to take the interpretation of the contract, as a matter of law, from the judge.<sup>3</sup> With respect to the con-

<sup>1</sup> Per Parke B., pronouncing the judgment of the court in *Neilson v. Harford*, 8 M. & W. 823.

<sup>2</sup> *Neilson v. Harford*, 8 M. & W. 806. 818, 819.; 2 Webst. Pat. R. 295. 328. S. C. This case virtually overrules *Hill v. Thompson*, 3 Mer. 630., where Ld. Eldon observed that the *intelligibility of the description* of a specification was a matter of fact.

<sup>3</sup> *Hutchison v. Bowker*, 5 M. & W. 535. Parke B. there observed, “The law I take to be this,—that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of those expressions was, but for the court to decide what the meaning of the contract was.” P. 542.

struction of letters, the old rule of law appears to have been, that if extrinsic circumstances were not necessary to explain them, then, like other documents, their interpretation was a pure matter of law; but if they were written in so dubious a manner as to be capable of different constructions, and could be explained by other transactions, the jury, who were clearly the judges of the truth or falsehood of such collateral facts, which might vary the sense of the letters themselves, were to decide upon the whole evidence.<sup>1</sup> We mention this rule, because, in Ireland, it seems still to prevail; and accordingly, when a question arose whether the defendant had adopted the acceptance of a bill, it was there lately held that the construction of a letter written by him on the subject, taken in connection with his subsequent conduct, was entirely for the jury.<sup>2</sup>

The power of the jury to interpret expressions is not confined to such as are employed in contracts, or have a peculiar commercial meaning, but seems to extend to phrases, capable of being used in a technical sense, which do not require any knowledge of the law to explain them. Thus, the courts have more than once refused to entertain the question, whether an excavation is a mine, and as such not rateable to the relief of the poor; but having so far laid down a legal principle with reference to the subject, as to decide that the method of working was to be considered, and not the chemical or geological character of the produce, they have declined to go further, and have left the sessions to apply to the question, as one of fact, the information they possess, and their knowledge of the English language.<sup>3</sup> But the jury will not be allowed to examine a record, for the purpose of giving their opinion as to what word has been written above an erasure, for the inspection of a record is within the peculiar province of the court.<sup>4</sup>

On the rule of law, which entrusts the judge with the interpretation of written instruments, an exception has been

<sup>1</sup> Per Buller J., in *Macbeath v. Haldimand*, 1 T. R. 182.

<sup>2</sup> *Wilkinson v. Storey*, 1 Jebb & Sy. 509.

<sup>3</sup> *R. v. Sedgley*, 2 B. & Ad. 65.; *R. v. Brettell*, 3 B. & Ad. 424.; *R. v. Dunsford*, 2 A. & E. 568.; 4 N. & M. 349. S. C.

<sup>4</sup> *R. v. Hucks*, 1 Stark. R. 522., per Ld. Ellenborough.

engrafted in certain cases, when the writing forms the subject of an indictment or an action on the case, and the guilt or innocence of the defendant depends upon the popular meaning of the language employed. Thus, on a prosecution for sending a threatening letter<sup>1</sup>, the jury will, upon examination of the paper, decide whether it contains a menace.<sup>2</sup> So, with respect to indictments for libel, the legislature, after much acrimonious discussion between the judges on the one hand, and the advocates of popular rights on the other<sup>3</sup>, has expressly determined<sup>4</sup>, that the question whether the particular publication, which is the subject of inquiry, is of a libellous character, and is calculated to injure the reputation of another by exposing him to hatred, contempt, and ridicule, is one upon which the jury must exercise their judgment, and pronounce their opinion, as a question of fact. The judge, indeed, as a matter of advice to them in deciding that question, may give his own opinion respecting the nature of the publication, but

<sup>1</sup> See 7 & 8 G. 4. c. 27. and 7 & 8 G. 4. c. 29. s. 8.

<sup>2</sup> *R. v. Girdwood*, 1 Lea. C. C. p. 142. c. 76.; 2 East P. C. 1120. S. C.

<sup>3</sup> As to this celebrated dispute, see, in support of the claims of the Judges, *R. v. Udall*, 1 How. St. Tr. 1289.; *R. v. Woodfall*, 20 Id. 918. 918. 920., per Ld. Mansfield; 5 Burr. 2661. S. C.; *R. v. Dean of St. Asaph*, 21 How. St. Tr. 1033., per Ld. Mansfield; and in support of the rights of the Jury, *R. v. Tutchin*, 14 Id. 1128., per Ld. Holt; *R. v. Owen*, 18 Id. 1223. 1227.; *R. v. Dean of St. Asaph*, 21 Id. 922. 971., arguments by Mr. Erskine, and 1040., per Willes J.; 29 Id. 49., per Ld. Ellenborough; 1 Woodfall's Junius, 14. et seq., 163, 169—176. As to proceedings in the House of Lords on passing the Libel Act, see 22 How. St. Tr. 294. 297.

<sup>4</sup> 32 G. 3. c. 60. s. 1. enacts that, on every trial of an indictment or information for a libel, "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." Sect. 2. provides "that, on every such trial, the court or judge, before whom such indictment or information shall be tried, *shall* \*, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases." Sect. 3. provides that a jury may find a special verdict; and sect. 4. reserves to defendant a right to move in arrest of judgment.

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\* Semble, the word "shall" should here be interpreted as if the word "may" had been used. See per Littledale J. in *Raylis v. Lawrence*, 11 A. & E. 925.

is not bound to do so as a matter of law.<sup>1</sup> The statute here noticed is strictly applicable to criminal trials only, but being a declaratory act, its provisions have been adopted in civil actions for libel, and for a series of years it has been the course for the judge, first to give a legal definition of the offence, and then to leave the jury to determine whether the writing complained of falls within that definition or not.<sup>2</sup> It is not, however, absolutely necessary that the judge should explain what constitutes a libel, but he may leave the whole question without reserve to the jury<sup>3</sup>; though, if they find a verdict against the defendant, either on an indictment or an action, the court will arrest the judgment, if the writing, on the face of it, is not libellous.<sup>4</sup>

<sup>1</sup> Per Parke B., in *Parmiter v. Coupland*, 6 M. & W. 108.

<sup>2</sup> *Parmiter v. Coupland*, 6 M. & W. 107, 108.

<sup>3</sup> *Baylis v. Lawrence*, 11 A. & E. 920.

<sup>4</sup> *Hearne v. Stowell*, 12 A. & E. 719.; P. & D. 696. S. C.; *Goldstein v. Foss*, 6 B. & C. 154.; *Parmiter v. Coupland*, 6 M. & W. 106., per Alderson B.

### ART. III. — POWER OF DEGRADATION IN THE UNIVERSITIES.

THE universities of the ancients had little resemblance to the more illustrious bodies bearing that name in modern times. To hold property in common — an attribute of all corporations aggregate, to have a common or university chest, and to sue and be sued by syndics or attornies, are the principal points in which they agree.<sup>1</sup> The ancient universities more resembled guilds, colleges, hospitals, or convents, than an assemblage of incorporated bodies, each having a separate existence, which is the state of the two great Universities in this country. For the same reason it would be more curious than useful to inquire into the powers and privileges of continental universities, as their rights, endowments, constitution, and powers differ widely from our own.

A degree is an academical title, granted by a university, conferring rank and precedence within it. To certain degrees of certain universities, acts of Parliament have given collateral advantages and privileges, conferring temporal advantages without the university granting the degree. Has the University the power of depriving one of its members of a degree for an academical offence; and if so, is it necessary that this offence should be described, and the penalty affixed by the statutes of the University? There is nothing anomalous in jurisdiction over the principal which could not be maintained over the accessory: a sentence of deprivation by the metropolitan infers the forfeiture of a freehold, and the loss of a barony<sup>2</sup>; a clerk may be degraded by his ordinary, which necessarily includes deprivation of benefice<sup>3</sup>; and a sentence of excommunication before the stat. 53 Geo. 3.

<sup>1</sup> Dig. III. iv. 1.

<sup>2</sup> *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 447. 541. 14 State Trials, 447.

<sup>3</sup> Burn's Ecc. L. Degradation.

c. 127. deprived the party of almost all temporal rights.<sup>1</sup> In that celebrated case it was not disputed at the final hearing, but that the University courts might, for sufficient reason, suspend from or deprive of degrees, but a peremptory mandamus was granted on account of the sentence being given, without giving Dr. Bentley an opportunity of being heard. In the case of the *King v. the Vice-Chancellor of Cambridge*<sup>2</sup>, the Court of King's Bench appears to have agreed with Mr. Yorke in his argument, that the two Universities are to be considered as lay corporations, not eleemosynary foundations, which puts an end to the right of the Crown to visit them<sup>3</sup>, for they issued the writ of mandamus on the ground that there was no other specific remedy<sup>4</sup>, which would not be the case if the Crown were visitor.

Frend's case<sup>5</sup> was a sentence of expulsion from the University for publishing within the University a seditious pamphlet, and a mandamus was moved for to restore him to the franchises of a resident master of arts; but the Court, without entering into the visitatorial right of the Crown, held the sentence the decree of a court of competent jurisdiction, and refused to grant a mandamus. Whiston's case, 1711.<sup>6</sup>; Duckett's case, 1739.<sup>7</sup>, Crawford's case, 1775.<sup>8</sup>, Davison's case, 1772.<sup>9</sup>, and the case of Shelley and others at Oxford in 1811, it is unnecessary to do more than mention. They were all cases of expulsion, and the offences so punished are or have been cognisable by the law of the land, as well as the statutes of the Universities.

It appears that Archbishop Laud claimed a visitatorial power in both Universities, and that three of his predecessors did in fact visit them. But his assertion of his right, though with a saving of the royal power of visitation, was made an article of his impeachment<sup>10</sup>, and it has not

<sup>1</sup> See Lord Hardwicke's argument in Bentley's case, Burn's Ecc. Law, Colleges, 2 Ld. Raym. 1345.

<sup>2</sup> 3 Burr. 1647.

<sup>3</sup> Id. 1652.

<sup>4</sup> Id. 1659.

<sup>5</sup> 22 Howell's State Trials, 523. 6 T. R. 29.

<sup>6</sup> 15 Howell's State Trials, 703.

<sup>7</sup> Hawkins's Johnson, p. 333. Monk's Bentley, ii. 392.

<sup>8</sup> Cowp. 315.

<sup>9</sup> Id. 319.

<sup>10</sup> 4 Howell's State Trials, 450.



been since claimed or exercised.<sup>1</sup> If the Crown is visitor of the Universities, against which there is a judicial decision of the Court of King's Bench, above noticed, its visitatorial power would be exercised either by special commissioners or by the Lord Chancellor.

If, on the other hand, the Universities are subject, like other civil or lay corporations, to the control of the Court of Queen's Bench, it can hardly be seriously contended that a mandamus would lie to either of the Universities, on the ground that they have no power to deprive a graduate of a degree once conferred. Such a power is implied in the foundation of every University<sup>2</sup>, of the exercise of which numerous instances are to be found in the archives of the Universities of Oxford and Cambridge, and are perpetually referred to by Wood and Dyer. A degree was originally a licence to teach<sup>3</sup>, and might be revoked by the same authority which granted it. *Cujus est condere, ejus est destuere*. Such a power is necessarily incident to all corporations.<sup>4</sup> Wherever there is a court of appeal in the University itself it should be resorted to in the first instance<sup>5</sup>, and a jurisdiction exercised time out of mind is not to be overruled upon nice questions of the constitution of the tribunal.<sup>6</sup>

The objection that the precise offence for which the party is deprived of his degree is not pointed out in the statutes, is not, if the fact be so, of much weight. Neither the general statutes of the University of Oxford, nor the particular statutes of the several colleges, avoid a fellowship by marriage, yet the *lex non scripta* of the University has always been held to warrant the college in filling the vacancy so occasioned.<sup>7</sup>

The acts of Parliament and charters of the two Universities have, in general, the object of extending their powers over persons not matriculated, that is, not members of the corporation, leaving the essential and inherent rights of the Universities untouched; as far as they seem to infringe

<sup>1</sup> See Burn's *Eccles. Law Colleges*, 2 Rushw. 324.

<sup>2</sup> See Savigny, *Geschichte der Römischen Rechts*, vol. iii. 175, 176. 707.

<sup>3</sup> 2 Lord Raym. 1345.

<sup>4</sup> *Rex v. Richardson*, 1 Burr. 539. *Rex v. Heaven*, 2 T. R. 772.

<sup>5</sup> *Rex v. Cambridge*, 6 T. R. 105.

<sup>6</sup> *Id.*

<sup>7</sup> *Exparte Lamprey*, West, 216.

upon them, they have been declared to be void.<sup>1</sup> Some of the charters, however, do recognise the right of the Universities to suspend and deprive graduates.<sup>2</sup>

If analogy is to be resorted to, all the cases at all similar will be found in favour of the power to deprive of a degree. A clergyman may be degraded<sup>3</sup>, a barrister may be disbarred<sup>4</sup>, a member of the House of Commons may be expelled<sup>5</sup>, a knight may be degraded<sup>6</sup>, and instances are to be found of the degradation of a peer.<sup>7</sup> In all these instances the punishment is not inflicted by the ordinary courts, and the party sentenced is deprived of a possession in the nature of a freehold.

In this slight sketch, which does not attempt to exhaust the subject, all direct controversy with the opinions already published has been studiously avoided; still less has it been attempted to go into the merits of the case now before the public. However unquestionable the jurisdiction, it should be sparingly and temperately exercised: large bodies of men, however educated, are apt to decide such questions with the spirit of partisans rather than in the temper, and with the sense of responsibility, befitting a judge.

<sup>1</sup> 3 Burr. 1656, 1657.

<sup>3</sup> Dyer's Privileges, i. 316, 317. 363.

<sup>2</sup> Gibs. Cod. 1066.

<sup>4</sup> Bousfield's case, 1839.

<sup>5</sup> Wilkes' case, 1 Bl. Comm. 163.

<sup>6</sup> Spelman's Works, vol. ii. 184.

<sup>7</sup> Nevill's case, 6 Rot. Parl. 173., Cru. Dign. 178.; Shrewsbury, earl, case of, 12 Co. 107., 2 State Trials, 741.

## ART. IV.—PRIVATE BILLS IN PARLIAMENT.

1. *Report from the Select Committee on Private Business ; with the Minutes of Evidence, and Appendix.* 1838.
2. *Resolutions on Railway Bills. Ordered by the House of Commons to be printed, 4th March, 1845.*

SOME alterations in that branch of parliamentary jurisdiction which relates to Private Bills have been made within the last few years in both Houses of Parliament, — alterations, in fact, so important as to give this jurisdiction a new character, if not to work in it an entire change. We have already noticed in the present Number the great extent and vast importance of the private business transacted by Parliament, and it is of the utmost consequence to watch the changes which are made in conducting it. They come to some extent suddenly ; the hands that work them are unseen, and yet are clothed with absolute power ; the tribunal lies out of the beaten track of lawyers, is accessible to peculiar interests, is subject, in fact, to most of the vicissitudes of political life, and, at any rate so far as the House of Commons is concerned, is exposed to much of the tumult of a popular and elective body. Let us see, therefore, in greater detail (for we have already glanced at them), the steps that have been taken in this matter within the last few years, for the important years in this respect do not amount to ten. The alterations to which we wish to call attention date from the Session 1837. And *first*, as to the House of Lords.

The inconveniences of the system which prevailed before the 6th of July, 1837, are thus mildly stated by the Duke of Richmond, in his evidence before the Private Business Committee of the House of Commons of 1838 : —

“The inconvenience of the old system was, that not only there were not the same peers listening to the whole of the evidence

upon the same bill, but that frequently there was one chairman one day and a different peer in the chair the next; the consequence was, that the proceedings were much longer than was necessary, and the nature of the attendance very unsatisfactory to all the parties. *There was another objection: it was found that peers came who had not listened to a single syllable of the evidence, and voted upon the question whether the preamble was proved or not: that led to a great deal of dissatisfaction among the peers themselves, and I have every reason to believe out of doors also.* — *Minutes of Evidence*, 1838, H. C., p. 46.

This dissatisfaction does not seem at all surprising; and we shall content ourselves, as to this point, with this short extract.

A series of Standing Orders, dated 6th July, 1837, however, were made, which ordered (among other things), 1. That every opposed bill, not being an Estate Bill, be referred to a Select Committee of five peers, who shall choose their own chairman; 2. That every one of such Committee do attend the proceedings of the Committee during the whole continuance thereof; 3. That no Lord who is not one of the five do take any part in the proceedings of the Committee; and, 4. That Lords be exempted from serving on the Committee on any private bill wherein they shall have an interest.

The five Lords are appointed by a Committee of Selection, who themselves take no part in private bills of this nature.

The working of this new system has been universally admitted to be highly satisfactory, and was so stated by Sir Robert Peel, and denied by no one in the House of Commons, on the 4th of March last, on the debate that then took place on the subject, and to which we shall hereafter refer. We shall therefore pass on to the other branch of the Legislature, after one further brief extract from the evidence of the same Noble Duke: —

“712. *Chairman.* Under the old system, was not it notorious that there was a great deal of canvassing went on? — *Canvassing by every method*; by letter, and by personal application.

“713. Has that canvass entirely ceased, or does your Grace think that the five members of the Select Committee thus named are exposed to it? — Certainly not; there is no canvass at all, I

believe: I do not know whether any parties speak to them about the matter, but I do not conceive either of the named peers would allow any person to speak to him upon the subject.”—*Minutes of Evidence*, 1838, H. C., p. 51.

Next as to committees of this nature in the House of Commons, it will probably be sufficient to observe that, previous to the Session of 1839, Private Bills were referred, according to the locality to which they related, to the Members technically called “on the Speaker’s list,” that is to say, to all the members for the counties and boroughs near the vicinity of the place to which the bill related, and thus frequently letting in one hundred and more members, who were thus constituted members of the committee.

We have been desirous that a peer should give an account of the system which prevailed in the House of Lords before July, 1837; and we shall now let a Select Committee of the House of Commons itself describe the system which existed before any alteration had been made by that House. This is the Select Committee which, with great credit to itself and advantage to the public, has sat for many sessions “to consider whether any and what improvement can be adopted in the mode of conducting Private Business.”

In their Second Report of the Session 1840 (9th July), they came, among others, to the following Resolution:—

“That previous to the Session of 1839, the constitution and practice of committees on private bills were so ill calculated to procure due investigation of the subjects referred to them, or to lead to equitable decisions thereon, as to have drawn forth reiterated complaints, to the discredit of committees and the disparagement of their proceedings.

“That such evils were mainly attributable to a system of canvass, by which in opposed private bills the attendance of members was procured to vote upon questions without having heard the evidence or understood the case; and in unopposed private bills, the names of members were used as having been in attendance upon committees from which they had been altogether absent. *That such practice had the effect of causing members to sanction, or to appear to sanction, proceedings of which they had no cognizance, and in unopposed private bills, of consigning to the promoters of the bill, without sufficient check, the framing of provisions by which the*

*rights of property of absent parties, and of the public, might, and in all probability would, be materially affected."*

So far the Committee itself. Let us see further what one or two respectable and experienced parliamentary agents told this very Committee in the year 1838. A few words as to the nature of the tribunal:—

"32. *Chairman.* Does inconvenience arise from so large a number of members being on a committee?—I think so; the very greatest, certainly, to those who are professionally engaged. It is a source of the greatest inconvenience to the solicitors in charge of the bill; they are in constant alarm, if their case is much opposed, lest they should be tripped up in any proceeding when they have not a majority of their friends in the room. The consequence is, that instead of being able to apply their whole attention to the conduct of their case, *they are travelling about for members every where, and the inquiry has more the appearance of a contest which is to be decided by the number of friends on one side or the other, than one which is to be decided by the merits of the case itself.*

"33. Within the last two sessions the numbers of the members voting on divisions has been taken down?—Yes, and their names have been printed in the Report in the case of Railway Bills.

"34. And also the names of all the members attending on the committee?—On railroads only; the members who have attended are only printed in the case of Railway Bills.

"35. Has that acted as a check on the members of the different committees?—If I may presume to say so, *I should say not*; I do not think it has altered the course of proceeding at all.

"36. Members have no scruple in coming down to vote without having heard a word of the evidence?—Certainly not.

"37. *Mr. Hume.* Have you not yourself, and do you not see other agents watch the time when a division is about to take place, and then collect as many members as you can, never considering whether they have heard the evidence or not?—It is the course adopted; I might perhaps be permitted to say, with regard to myself and some other agents, that we do not practise canvassing; there are persons who do it, and the solicitors generally are obliged to do it: but I think some of the parliamentary agents do not canvass at all; it certainly is the custom that parties are always employed when a division is expected, in making a whip for the occasion.

"38. *Sir James Graham.* Though it is not done by the parlia-

mentary agent, is it not the practice of the attorneys and country agents who come to London?—It cannot be done otherwise; there are generally deputations here for the express purpose.

“39. *Chairman.* Has that practice prevailed for a great number of years?—As long as I have known business.

“40. *Mr. Aglionby.* Has it not been the practice to hunt for members through the different committee-rooms to come and make a division?—No doubt of it.

“41. *Viscount Ebrington.* Has that practice increased or diminished of late years?—Of late years we have had more contested bills; railroads have produced a new kind of practice; there has been much more contest than there used to be, and therefore it has prevailed more of late years than it did formerly, but simply from that circumstance, that there have been more contested bills.”—*Evidence of Mr. Burke*, pp. 3, 4.

The days of these peripatetic judges are now, we trust, over for ever. The member-hunt goes on no longer; but when we read this account, and remember that it correctly describes, in the words of the Select Committee, “the constitution and practice of all committees on these bills” previous to the Session 1839, we cannot sufficiently express our amazement. Yet this very system had its defenders down to this very session, and they may yet exist. But could it possibly happen that such a system was not exposed to the suspicion of crimes, perhaps not greater but more odious, than gross neglect and entire want of principle? We have seen what Mr. Burke says as to the attendance and non-attendance of members. Let Mr. Hayward delicately hint, on the suggestion of three members of the House, one of them being the Chairman of the Committee, the present Speaker of the House of Commons, as to some other means which were taken to ensure the attendance of members. Let him be allowed, with evident reluctance, to give some account of a Parliamentary Crimp. Let it be remembered that we have an unwilling witness speaking of the practices of the body of judges who examine him.

“310. *Mr. Aglionby.* I do not ask whether the means have been successful; have you known it proposed by the solicitor or deputation to use such means as offering shares to members to induce an attendance?—I have heard of such a thing, certainly.

"311. From the deputation? — I have heard that spoken of.

"312. By persons promoting the bill? — I cannot recollect by whom; I have heard that mentioned.

"313. *Chairman*. You do not know it of your own knowledge? — No.

"314. *Mr. Hume*. Have you any doubt that such means have been resorted to as offering shares to members to interest them in passing measures of that kind? — I have heard it said from quarters on which I place reliance, but I dislike believing it.

"315. *Mr. Aglionby*. You are not asked whether it is accepted, but whether it is considered by the promoters as one means of inducing members to attend? — I believe so; I have no reason to believe it myself from any thing that has come to my personal knowledge; the people who canvass pretend to have influence with members; whether they have or not, it is not for me to say: a person introduced himself to me one day, whose name I did not know, and he held a list of members in his hand; he had crosses against the names of several whom he professed to be able to influence; he said it might be useful to me in some of the bills in which I was engaged if his services were retained.

"316. Was there any sum mentioned by him to be paid for his services? — There was not; I cut the matter rather short by ringing the bell and having him shown out.

"317. Was he a professional man? — No; I do not believe there is a professional man that would do such a thing." — *Evidence of Mr. Hayward*, p. 21.

All this is exceedingly disgusting, whether the crimp's boast were founded in truth or entirely false. Let us hope, therefore, that this system is for ever at an end, and let us pass on to that which has been introduced in its place since the Session 1839 to remedy these evils.

We should have thought that these facts would have been sufficient to induce the Committee to make an entire change: but the tide of corruption ebbed but slowly, and the Committee of 1838 (before whom this evidence was given) used the knife most delicately. Referring to the evidence they observe: —

"It will there appear that the constitution of the present List Committees upon the Bill, and their mode of conducting business, is universally complained of. The same witnesses, however, are far from agreeing as to the remedy; the plan adopted this year by the House of Lords has been recommended by many of them,



and resolutions embodying the principle in practice, and carrying out the details of the plan, were submitted to your Committee, and will be found in the Appendix. In consequence, however, of a difference of opinion among the Members of your Committee, it did not appear expedient to recommend the adoption of such a plan to the House, or to depart from the opinion entertained upon this subject by the Committee which sat last year upon Public and Private Business.

“Other modifications of the present system, not involving a departure from the principle of local representation in committees, but uniting that with the attendance of Members unconnected with the interests under discussion, were likewise considered; but, upon the whole, your Committee are not prepared at present to recommend the adoption of any change in this respect. The subject, however, is one of so much importance, and the constitution of Committees on Private Bills, and their mode of transacting business according to the present system, is avowedly so far from being satisfactory, that they deem the further consideration of it well worthy of the attention of the House at the earliest period of the next Session.” — *Report*, p. iii. iv.

The tone of the Committee is certainly sufficiently mild. However, no sooner did the Session of 1839 commence than this Committee, according to the promise held out, went to work, and presented their First Report; and, in pursuance of the resolutions therein contained, the House of Commons came to a series of resolutions on the 28th of February, and it was (among other things) resolved, “That it is expedient that new lists be prepared under the direction of Mr. Speaker, reducing considerably the number of members;” “That a Committee of Selection be appointed;” “That no member whose name shall be on the list prepared under the direction of Mr. Speaker shall be entitled to attend or vote, unless he shall have previously made a declaration, in such form as shall be presented by the Committee of Selection, of his willingness to serve throughout the proceedings of the Committee on the Bill referred to in the list to which he belongs;” “That the Committee of Selection shall select and add to the list such number of members not locally interested in the bill in progress, and in such proportion, as in the circumstances in each case shall in their judgment be necessary, such members making a declaration of their wil-

lingness to serve throughout the proceedings of the Committee."

In the Session 1839, therefore, a considerable modification was made in the practice of appointing committees: the numbers on the committees were greatly reduced; a certain number<sup>1</sup> of "selected members" were chosen by the Committee of Selection, and added to the Committee on the Bill; and all the members who served signed a declaration to serve throughout the proceedings of the Committee. This system has been in force since the beginning of the Session 1839, down to the present session; but it must not be supposed that it has given unmixed satisfaction. Before the Session of 1839 had expired, the same Committee thus adverted to it in their Second Report: —

"Your Committee have further to call the attention of the House to the evidence given by Mr. Estcourt, the chairman of the Committee on Standing Orders and of the Committee of Selection, in relation to the working of the system adopted by the House for the constitution of Committees on Private Bills at the commencement of this Session. They feel great satisfaction at the advantages which it appears from his testimony have resulted from this change, and they earnestly recommend to the House steadily to persevere in the plan, *with such amendments as have been suggested by Mr. Estcourt*, or may be found desirable from further experience."

What, then, said the experienced Mr. Estcourt? And we may say, to no man in or out of the House of Commons, on such a subject, would we pay more implicit deference: —

"It is satisfactory to observe," says this gentlemen, "that notwithstanding the novelty of the arrangement, and that members were consequently very little acquainted with the necessity of their attending punctually upon the committees on which they were

<sup>1</sup> They were first, we believe, called "impartial members:" but this was an awkward appellation. It was our lot to serve in one of the first private committees which sat after the new system came into operation. Our interest was a local one, and just before the proceedings were to commence, the agent for the bill came up to us, and said in a whisper, "Pray don't let them go on, sir, yet; our *impartial members have not arrived!*" This showed that the agent considered that the members then assembled had not met there to decide according to the real merits of the case.

summoned, there have been only four instances in which committees have dropped in consequence of the non-attendance of the selected members, and all those committees were revived the following day under the orders of the House."

But how did it fare with the other class of members, technically called the Members on the Speaker's list? —

"It frequently happened that an insufficient number of members upon the Speaker's list was not in attendance, and many committees would have dropped, had not the Committee of Selection thought it expedient to authorise the individual member of these committees to act upon his own responsibility, and to select and place upon the committee so in danger of dropping, *other members who were found accidentally about the House*, in order that they, acting as additional selected members, might assist in completing the quorum.

"As we have found, therefore," continues Mr. Estcourt, "from experience that very few members did apply on account of the local interest of their constituents, as we have found great readiness to attend on the part of the selected members, while at the same time we have found that few of those members who were on the Speaker's list were disposed to attend; *I presume to think that if the whole of the committee were to be constituted of members selected, there would be a greater probability of a good attendance than if any reliance were placed upon the Speaker's list.*"

No further alteration, however, of any importance, was made until the present session. Nay, attempts at a further extension of Mr. Estcourt's suggestions have failed.

Thus, on the 27th of January, 1841, Mr. Ewart moved, "That it is expedient that Committees on Private Bills should be approximated more nearly than they now are to judicial tribunals, and exempted, as much as possible, from all motives of local and personal interest, and that the responsibility and efficiency of committees of this House in general would be promoted by diminishing the number of members composing them."

This motion was, however, lost by a majority of two in a thin House; the ayes being 22, and noes 24<sup>1</sup>: and other motions of a like nature have shared the same fate.

<sup>1</sup> Hansard, P. D. vol. lvi. 134.

But early in the present session a Select Committee was appointed to enquire into the best mode of constituting committees on Railway Bills, and this Committee made a Report on the 28th of February (an auspicious day for right legislation in this matter), in which they resolved (among other things)—1. That a committee of five members be appointed, to be called “The Classification Committee of Railway Bills,” and that three be a quorum of such committee. 2.<sup>1</sup> That the Committee of Classification shall form into groups all railway bills or projects which in their opinion it would be expedient to submit to the same Committee. 3. That Committees on railway bills during the present session shall be composed of a chairman and four members, to be appointed by the Committee of Selection. 4. That each member of a committee on a railway bill or bills shall, before he be entitled to attend and vote on such committee, sign a declaration *that his constituents have no local interest, and that he himself<sup>2</sup> has no personal interest for or against any bill or project referred to him*; and no such committee shall proceed to business until the whole of the members shall have signed such declaration. 5. That no member of a committee shall absent himself from his duties on such committee, unless in the case of sickness, or by leave of the House. 6. That committees shall be allowed to proceed so long as three members shall be present, but not with a less number, unless by special leave of the House. 7. That in the case of a member not being present within one hour after the time appointed for the meeting of the committee, or of any member absenting himself from his duties on such committee, *such member shall be reported to the House at its next sitting.*

These resolutions were subsequently reported and carried unanimously by the House of Commons on the 4th of March.

We have here, therefore, the principle acted on and carried out in this large and important class of private bills, that all local and individual interest shall be, as far as possible, excluded, and that a committee is to proceed judicially; and we

<sup>1</sup> The resolutions are not numbered according to the original.

<sup>2</sup> Should not the words of the resolutions be extended to the future acquisition of an interest?

cannot but think that this, although a very important step, will be followed by another in the very next session, — we mean the application of this principle to every other class of opposed private bills; for surely the very same reasons should govern every class of those bills as well as Railway Bills. Why should a road or a canal be dealt with by one kind of tribunal and a railway by another? If local and individual interest be excluded from a committee on one kind of ways, why is it to be admitted on the other?

It is to be observed that the principle now extended to Railway Bills is already in force in another important class of bills — Divorce Bills. Mr. Estcourt may fairly be said to be the author of this change. In his evidence before the Committee of 1839, he says that in 1838 these bills were “for the first time committed to a Select Committee, to take charge of which the Committee of Selection selected seven members of the legal profession, as being peculiarly well qualified to conduct inquiries so delicate and often so intricate;” and he suggested “that a committee of five or seven members conversant with the law should, at the commencement of each session, be appointed as a Select Committee, to whom might be consigned every Divorce Bill.”

This suggestion has been acted on since 1840, and at the commencement of each session a committee is appointed, consisting of not more than fifteen members, of whom seven are a quorum. This committee is called “The Select Committee on Divorce Bills.”

But we must not pass without a word the very important debate which took place on this subject on the 4th of March last, when the Resolutions of the Committee were moved. In that debate Mr. Bernal<sup>1</sup> fairly started the propriety of taking all judicial business from the House of Commons, if not from Parliament. On the resolution for enforcing the compulsory attendance of members on committees, Mr. Bernal said —

“That this was the first time this principle of enforcing attendance had been called into operation, excepting in the case of election committees, where it was established by statute. At pre-

<sup>1</sup> We quote from the “Times” of the 5th March.

sent, compulsory attendance was not established with respect to any species of private business. He, for one, thought they were about to impose a great hardship on members of the House; he was not exactly prepared with a substitute; he only asked the House to consider what difficulties they would have to encounter. Honourable Members would constantly be starting up and stating, either by themselves or by their friends, grounds of excuse for serving, in order to obtain leave of the House for non-attendance. What description of excuses would be available? There was a large class of gentlemen particularly qualified for duty on these committees; *were the Committee of Selection to admit, as an excuse, that a member was going on circuit, or attending sessions, or otherwise engaged in professional business?* It must be remembered, that these committees might last two or three months in many cases; that would not be too long a period for Irish railway projects (hear). Again, other Honourable Members might be engaged in mercantile pursuits; was that to be a ground of excuse with the Committee of Selection, or with the House? When they considered that, in the course of the session, they were to have two hundred and forty-eight railway bills before them, these questions became very serious. The actual tug of warfare before the committees would not commence till after Easter, so that probably a great part of the bills would hardly be got through before the end of the session. Then there were other members, not merchants, traders, or barristers, who had important business to attend to, or who might have to attend to business that sprung up unexpectedly. *He must say, he wished the whole of the House could be removed from it. Railway business had sprung up since most of them had been returned as members. They had never contemplated being engaged in such business on becoming members. He wished, therefore, for a tribunal with a judge or judges, who could fully investigate all the questions bearing upon each railway project, and not merely upon railways, but other questions of private business which affected the interests of the country.* On these occasions of attendance, he for one should be disposed to be a little rebellious; but, always since he had known the House of Commons, there had been a sufficient number of amateurs who would be disposed, from love of the thing, to attend to business of this nature. He confessed he had not that love of attendance on other people's business, although he did not consider himself the less fit for his duties as a member of the House when he declared that he disliked these compulsory attendances."

Now, it must be remembered that this opinion is not one

hastily come to. It was avowed before in the course of the present session. It comes also from a gentleman of great experience, and particularly well acquainted with the private business of the House of Commons;—a former Chairman of Committees for, we believe, more than ten years. It must also be remembered that Mr. Bernal is “a Whig and something more.” It was not surprising, then, that this opinion should provoke commentary: we must, however, content ourselves with the speeches of two of the commentators: but the whole debate is curious and instructive. Mr. Warburton said he

“Would do the Right Honourable Baronet (Sir R. Peel) the justice to say, that he had always been ready to maintain the privileges of the House of Commons, and he did not think the privileges of the House of Commons could be maintained, unless it showed the public proofs of its general utility (hear, hear! from Sir R. Peel). Was the House to abdicate its duties with respect to private business? Unless the House performed those duties the public, finding that in one of the most important particulars the duties of the House were abandoned, would assuredly begin to consider whether the House performed its duties in other particulars (hear!). Therefore, however inconvenient to Honourable Members it might be, he thought that when they entered the House, they were bound to make up their minds to take their part in the duties of the House. With respect to his Honourable Friend who had spoken last, he (Mr. Warburton) was not at all afraid that his Honourable Friend would not perform those duties as readily as any one else. If the House abdicated its duties on this head, the country would say, “Oh, you can talk of party matters long enough; but when it comes to this, which is the most important of all your duties, then you cannot perform it.”

This brought up Sir Robert Peel, who

“Declared he had the strongest feeling on this subject; for it was one which essentially concerned the character of the House, and which concerned the due discharge of their duties to the country. The Honourable Member who had spoken last but one (Mr. Bernal) said, he was an advocate for the removal of the private business to some other tribunal. How was such a tribunal to be constituted; and what functions was it to have? He (Sir R. Peel) had a very great respect for the opinion of the Honourable Gentleman (Mr. Bernal) on questions of privilege, but he was

surprised that the Honourable Gentleman should propose to transfer the power which the House at present exercised over these matters to any other tribunal. But what was the power which the Honourable Member proposed to give to the tribunal with respect to private business, or with respect to this railway business? Was it intended to give the force of law to the decisions of the tribunal with respect to what was called Private Bills? He (Sir R. Peel) said, that the taking that course would not only be abdicating their duties, but erecting by their side a tribunal which would shortly have more power than the House of Commons itself (hear, hear!). How was the tribunal to be constituted? Was it to be elective? and, if elective, who were to be the constituents? Were they to be the same as those of the Members of the House of Commons? or was the tribunal only to inquire, sitting out of doors, with a judge at its head; the duty of the House of Commons being merely to register its decisions? Or was the House of Commons to have the power of reversing the decisions of the tribunal; and, if they had that power, was it to be after inquiry or not? And how would such a system be likely to work? But if they gave the tribunal the power of deciding, they would be erecting a tribunal which would soon obtain a greater degree of the confidence of the country than they possessed themselves, for they would show they were obliged to take that step from their inability to discharge their own functions.<sup>1</sup> He could not conceive any proposal more fatal to the character of the House of Commons. The Honourable Member said that many Members of the House did not contemplate the railway business when they were elected; but the business had come upon them; and they might depend upon it, that by determining to overcome this difficulty, they had an opportunity of exalting the character of the House of Commons, and raising themselves in the eyes of the country. He knew this attendance was a thing that could not be accomplished by force; but if Honourable Members were determined to grapple with business, he was confident there was that feeling in Honourable Members, that they would make sacrifices in order to discharge their duties. The House of Lords had done this voluntarily. They had appointed five Members, who went through all Railway Bills, and the plan worked well; and those five Members carefully went through every Railway Bill that came up to the other House of Parliament. Could it be suffered, then, that they, the representatives of the people, should delegate their powers to a tribunal

<sup>1</sup> Do not these observations apply to the Railway department of the Board of Trade? See *ante*, p. 16, *et seqq.*



with a judge in another place? He should be ashamed to have a seat in the House if he consented to such a resolution. Let all, then, on each side of the House, whether in office or out of office, determine to overcome the difficulty. He declared that he would come down, if it were necessary, whatever his occupations might be, and would sit there four hours a day, rather than see the House come to such a resolution. He had opposed the removal of the election jurisdiction, and he should say, that if one day they were to part with their jurisdiction in elections, and another day with the management of private business, the House of Commons would degenerate into a mere debating club (hear, hear!). If they said that they would not attend to the internal affairs of the country, and if, nevertheless, they were ready to come down, day after day, and consume eight hours a day in mere party debates, let them beware of that great power which would be growing up by their side in this tribunal. They would find that one year would not elapse before, in consequence of not performing these important duties, they would lose the character they had as the representatives of the people, and the guardians of the rights and interests of the country. Whether the House would be found to have the power to enforce this resolution or not, he would not predict; but he would say that it was a duty which every Honourable Member ought to be ready to perform, and he could not listen to a contrary doctrine for the first time, without entering his protest against it. He would point out to the younger Members of the House this opportunity of raising a character in the House and with the country; and he ventured to say, that an Honourable Member, if he served on one of these committees for the purpose of gaining experience in business, — that such a man, when he had served on a few committees, might gain a much more valuable character than if he had made a clever speech in the House; that he would gain a character for experience, for integrity, and for superiority to party and local considerations, which would be most valuable. *Let, then, Honourable Members determine, both on one side and the other, in office or out of office, to overcome these difficulties by referring these railway projects to committees, excluding local interests; and then let them fairly meet the whole of the difficulties that might arise; and if they succeeded, they would do more to establish the House of Commons in the respect of the country, than if they prolonged into September debates on topics of party interest, whatever ingenuity might be shown in making long speeches.* If the Honourable Gentleman was desirous of this alteration, he (Sir R. Peel) hoped he would bring forward, without loss of time, the measure he would propose for effecting it, in

order that the House might extinguish in the bud a plan which was pregnant with fruits that would be dangerous to the privileges of the House, as well as to the best interests of the country."

No one can doubt that the opinion of Sir Robert Peel on this subject is entitled to the greatest attention. His speech seems to us so important, that we have thought it right thus to put it on record: at all events, we think it must be conceded, that a fair trial should be given to the experiment now made to render the parliamentary tribunal for Private Bills as perfect as possible, by assimilating it to other judicial tribunals. Much has been done in the present session; and no one, we think, can doubt that before any transfer of business can even be talked of, we should see how the new system of committees works.

For our parts we are quite content to do this: but let us consider for a moment the important admissions which have been made by the change which has just been made. The old principles on this subject were virtually, that a Member of Parliament need not attend committees, or if he did, need not hear the evidence; might vote as he pleased; might listen, might not listen; might walk about, might not walk about; might write notes, might not write notes; might act and sit as a judge, or might not act or sit as a judge; might incur the suspicion of corruption, or any other motive;—in fact, was wholly irresponsible to any body on earth for all his acts and dealings in private business. His conduct in public business might perhaps be looked at: in private business he might job for his constituents or himself as he pleased.

Let it then be remembered that this system is at an end; that these principles are abandoned; that a new system is to be introduced, in which a member shall attend, shall hear, or be in the way of hearing, and shall be supposed to vote conscientiously. Neither local, nor personal, nor party interests are to bias him. They are all to be excluded. He is to act judicially. The House of Commons, then, is to be now on its trial. That is the issue boldly presented by Sir Robert Peel. It must satisfy the country that it is willing and able to discharge these important duties. We are quite content to give it the trial. But what if it should fail? what if it should prove unwilling and incompetent? what if it should not give

satisfaction? The answer is obvious: if it shall fail, the propounders of the remedy cannot stop here; they must go on; they must amend; they must introduce something else; they must remodel the present tribunal, or substitute some other. They cannot, as heretofore some did, boldly admit, that the system is open to every theoretical objection, but stick to it nevertheless as working well. They cannot admit that their idol is blind, and deaf, and deformed, and disgusting, and notoriously made of wood and brass, and yet continue to worship it. They must pull it down and erect another. In this consists the safety of the public. We must, it is now admitted, have an effective tribunal for the disposal of the private business in Parliament. We are most willing to try the one that has been given us: our wishes are that it may be successful. We see and admit the difficulty of the transfer of the business; but, for the safety of the institutions of the country, we cannot suffer a new system to incur the imputations which lay so heavy on the old. Give it a fair trial. Take any number of years you please; but, if eventually it fails — if it does not satisfy the public as to its honesty, capacity, and ability for the work (for this is the test by which it is to be tried) — then you must agree on your own admission to the transfer of the business to some other more fitting tribunal. You have said that the House of Commons is competent: if it turns out incompetent, then some other must be found. Let not our readers pass this matter over as trifling, or of subordinate interest. It is pregnant with results of grave constitutional importance. It is no mere question of privilege. It is one of those questions affecting the representative system which the passing of the Reform Bill has brought on and forced into public attention.

And here we will avow ourselves friendly to retaining this jurisdiction in Parliament in all matters except divorce bills, which are purely judicial, if it be possible. In all other matters, nothing but the superior claims of justice could reconcile us to the transfer to any other tribunal. No one who for a moment considers the materials of which both Houses of Parliament are composed, can really undervalue their ability to dispose of their business. In both Houses a large majority of members are probably incompetent, but certainly indisposed, to under-

take any serious labour of any kind, far less labour requiring judicial or legal knowledge or habits. Still it is to be remembered, that even of this number most have had considerable experience of mankind, and almost all have had that dealing with property which imparts some practical ability in matters of business. The great advantage which the upper classes now possess in this country is, that they drink at the fountain that information which is soon after diffused through a thousand channels ; but it is impossible for any man to sit perpetually at the fountain without imbibing something. We have no wish to overrate the abilities of members of Parliament, but then it is more absurd to underrate them. The most stupid county member — the most obtuse peer — has attained, of necessity, more information and experience than a man of the same average of dulness in a lower station. Still it must be admitted by all impartial persons that the great majority of both Houses are incompetent to decide on the important judicial duties entrusted to them. But in the minority men are to be found whom we consider particularly well fitted for the discharge of the duties connected with the private business of Parliament. In this minority, both in the Lords and Commons, there are some of whom their country may well be proud. Men who possess much of the technical learning of the lawyer, without his prejudices — who have very frequently received a good legal education, but who, from various circumstances, have not followed the law as a profession — men of great practical knowledge of business, of large experience, perfectly familiar not only with books but with mankind, and knowing how to use both on occasion. It is this class of men, who are, in our opinion, far superior to the average run of lawyers, on whom the real working of the system of private business falls, and to whom, and to those selected by them, we wish to see it more and more closely confined, and whose services in this branch of parliamentary jurisdiction cannot be sufficiently valued or estimated. They are frequently but little known beyond the circle of Parliament. Their names only occasionally appear in the public business of the country. With great capacity oftentimes for speaking, they have the rare merit of exercising it only when absolutely necessary: they are content with the quiet

influence acquired by the zealous and honest discharge of their duties. We have great confidence in this class of members in both Houses of Parliament, and to them we would willingly submit its private business, only reserving to ourselves the right, if the new system fails, and is no better than the old one, which we neither desire nor expect, to call on them for a better.

There is at least one other plan to which recourse may be had before these bills are entirely removed from Parliament, and there is much to be said in its favour. Why should there not be, for purposes of this nature, a joint committee, composed of members of both Houses? There would be many obvious advantages — a uniform practice; great saving of expense; a larger body from which to select the most competent members of each committee. Nor is this plan entirely without authority. In 1834 a Bill to provide for the trial of charges of general bribery was carried up to the House of Lords, and in the select committee on the Bill in that House this principle was introduced. The Bill was not proceeded in, owing to the lateness of the session. By this Bill, so amended, five peers and seven commoners, out of a selected list, were to form a COURT, to inquire into the alleged charge of bribery. We have reason to believe that this plan was mentioned in the committee of the present session, which has originated the resolutions of the 28th of February, and we certainly think it well deserves consideration.

So far we have been chiefly adverting to private bills which are opposed. There is a very large and important class which are *unopposed*; and as to these the following course is taken in the House of Commons, in consequence of the recommendation of the Second Report of the Private Business Committee of the year 1839. They are referred to the chairman of the Committee of Ways and Means, together with the members who had been ordered to prepare and bring in the bills; or if the bills come from the Lords, to the chairman of Ways and Means and two members named by the Committee of Selection.

There is another matter connected with this subject, in which considerable progress has been made in the present session — we mean in what have been called *model bills*.

The Committee of 1838 deemed it to be well worthy of consideration, whether there might not be some general principles established in respect to the phraseology and enactments of private bills (according to the several subjects which they may embrace), which would, among other things, tend greatly to reduce the labour of preparing a *breviate* for each individual bill; and with that view they recommended "the employment by the Government of some competent professional persons, who shall classify the private business, and prepare drafts of general bills to be submitted to the Legislature at the commencement of the next session, as the form of general enactments under each head." The progress made in these bills has not been quite so rapid as was contemplated by the Committee of 1838; but after various delays at the commencement of the present session of Parliament, *model bills*, consolidating the clauses in the following Bills, were introduced: —

Companies' Clauses Consolidation;  
Railway Clauses Consolidation;  
Land Clauses Consolidation;

Similar Bills, containing the same clauses with some variations, have been introduced applicable to Scotland.

These Bills have now passed both Houses of Parliament, and will abridge both the labour and expense of future bills on these matters. But they must also be considered the first step in that revision of public Acts which is so generally admitted to be necessary, and to which we have already called attention.<sup>1</sup>

Before concluding this article we must say a few words on another point, which has been brought before Parliament as the great redresser of all wrongs — we mean the speeches of counsel before Private Bill Committees. The worthy gentleman who introduced this subject — an acute man withal — did not hesitate to say, that the barristers who practised before these Committees, being paid so much per day, took pains to make speeches unnecessarily long, and tedious, and spun out in order thus to increase their pecuniary gains. It is very easy on these occasions to answer such accusations by a general reference to the honour and respectability of the bar;

<sup>1</sup> See 1 L. R. p. 134.

but this falls but flatly on ears so practised as ours to all such asseverations. It was probably an ungentlemanly thing to say; but if the accusation has any foundation in truth, it is a much more ungentlemanly thing to do that which warranted the charge. We are willing to make many allowances for counsel in addressing committees composed as we have already seen in this article they were composed; neither do we profess ourselves to be over nice as to the length of counsels' speeches: we would leave much, very much, in this matter to the discretion of counsel; and if this be loose morality, we must even quote the everlasting pages of Boswell in defence of it, who thus refers to this subject: —

“The election for Ayrshire, my own county, was this spring tried upon a petition before a committee of the House of Commons. I was one of the counsel for the sitting member, and took the liberty of previously stating different points to Johnson, who never failed to see them clearly. ‘When speaking to the committee,’ he said, ‘you must not argue there as if you were arguing in the schools; close reasoning will not fix their attention: you must say the same thing over and over again in different words. If you say it but once, they may miss it in a moment of inattention. It is unjust to censure lawyers for multiplying words when they argue; it is often necessary for them to multiply words.’”<sup>1</sup>

Again, in another volume: —

“I told him I was engaged as counsel at the bar of the House of Commons to oppose a Road Bill in the county of Stirling, and asked him what mode he would advise me to follow in addressing such an audience. Johnson: ‘Why, sir, you must proceed generally with a good deal of *extraneous matter, which you are to produce occasionally so as to fill up the time; for you must consider that they do not listen much.* If you begin with the strength of your cause, it may be lost before they begin to listen. When you catch a moment of attention, press the merits of the question upon them.’”

Boswell afterwards talked with Wilkes on the same matter: —

“Mr. Wilkes’s advice as to the best mode of speaking at

<sup>1</sup> Vol. VIII. p. 47.

the bar of the House of Commons was not more respectful towards the senate than that of Dr. Johnson: 'Be as impudent as you can, as merry as you can, and say whatever comes uppermost. Jack Lee<sup>1</sup> is the best heard there of any counsel, and he is the most impudent dog, and always abusing us.'<sup>2</sup>

We are willing, then, to allow a barrister a very great latitude in addressing a committee of the House of Commons; still we are always pained to hear accusations of this nature, and yet more grieved to think there should be good ground for them. And we fear that in this instance they are not entirely without foundation. The bar has been always, and will be always, probably, a money-getting body; but as all other persons will make money when they can do so, they are, at all events, no worse in this respect than their neighbours. Still other motives in most other departments of the profession mingle with the lust for gold. But a counsel who takes parliamentary business as his sole pursuit has little else but money to stimulate his exertions. He cannot respect the tribunal before which he practises: he may occasionally meet a member who can appreciate his exertions; but as a general rule, his best argument is to the great majority of his hearers "as utter foolishness." He is not improving himself—he is not advancing in the true professional road. He *may be making money*; but he is doing nothing else. It is to this department of the profession, therefore, to which, as it appears to us, this charge fairly applies.

<sup>1</sup> Mr. Croker's note on Jack Lee is as follows:—

"Mr. Lee, afterwards solicitor-general in the Rockingham administration. 'He was a man of strong parts, though of warm manners, and who never hesitated to express, in the coarsest language, whatever he thought.'—Wraxall's Mem. vol. ii. p. 237. He was particularly distinguished by the violence of his invectives against the person and administration of Lord Shelburne in 1782."

<sup>2</sup> Vol. VII. p. 52. ed. 1835. Johnson, however, was disgusted with the election committees of his time. "His notion of the duty of a member of parliament sitting on an election committee was very high; and when he was told of a gentleman upon one of those committees who read the newspapers part of the time, and slept the rest, while the merits of a vote were argued by counsel, as an excuse, when challenged by the chairman for such behaviour, bluntly answered, 'I had made up my mind upon that case,' Johnson, with an indignant contempt, said, 'If he was such a rogue as to make up his mind upon a case without hearing it, he should not have been such a fool as to tell it.' I think Mr. Dudley Long said, 'The doctor has pretty plainly made him out to be both rogue and fool.'" Vol. VIII. p. 48.



The true remedy is to improve the constitution of the committees. A good committee will soon cut down the number of days' sitting taken up by parliamentary committees. For this we must again cite the Duke of Richmond. Let us see his Grace's account of the manner in which the Lords' Committee disposed of some contested bills. After mentioning several, he goes on thus : —

“ Fishguard Harbour was the next ; Lord Hatherton was chairman, with the Earl of Morton, the Earl of Effingham, Lord Sheffield and Lord Rayleigh ; they sat for three days, and passed the Bill, with compensation to the petitioners, and some other amendments. That Bill is now, I believe, in the House of Commons. There was no adjournment at all. The next is the Wadsley and Langset Roads Bill ; the Marquis of Salisbury was in the chair ; Lord Abingdon was one of the members of the committee, Lord Sondes was the third, Lord Foley was the fourth, and Lord Gage was the fifth ; but it adjourned the second day without proceeding, and reported specially that Lord Sondes was unable to attend this day in consequence of the illness of his son ; his son met with an accident, and was very nearly killed, at Eton ; he left town immediately, believing his son to be very dangerously ill. The committee therefore applied for leave to sit in his absence, which they did, leave being given ; they sat two days, and also prayed leave to adjourn the next day, which was Saturday, at three o'clock ; the reason was not given, but the House allowed it. Lord Foley was originally appointed on this committee, but it was found that he was either out of town or on duty as one of the household of her Majesty, and Lord Carberry was therefore substituted. The next was the Lough Foyle Drainage Bill ; Lord Brougham and Vaux was in the chair, Earl of Leven and Melville, Earl of Dartmouth, Earl Cowper, and Earl of Camperdown ; they sat one day, and obtained leave of the House the first day to adjourn for an hour, Lord Brougham being in attendance on an appeal case ; the committee sat that day and reported the Bill ; it was re-committed to the same committee to take consents, and the committee was ordered to meet again the next day, at two o'clock, for that purpose ; in point of fact it was one day, and a short portion of a day ; they then committed it to take some consents which were necessary.”

If there is a good chairman and a committee who will support him ; above all, if there be not one side in the committee which wishes for delay, we think this matter may be left to right itself.

While these sheets are passing through the press, we perceive that the Railway Committee, by their Second Report, has endeavoured to curtail the length of counsel's speeches by a specific resolution, that "counsel appearing before Railway Committees shall be entitled to open the case, but not sum up the evidence." The proposed resolution, however, did not meet with much favour from the House, and was withdrawn by the Committee. We are quite satisfied that the feeling of the House was right. Any overt attempt to restrain counsel in this respect would be, as we think, exceedingly ill-judged, the *esprit de corps* would be roused, and rightly roused. We have already expressed our opinion on the subject; and we would hope that the whole will be left to the discretion and proper feeling of the Bar, which we are satisfied will not be appealed to in vain.<sup>1</sup>

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#### ART. V.—A MEMOIR OF ALLAN LORD MEADOWBANK.

THERE have been few more eminent lawyers on the Bench of either country, perhaps of any country, than the late Lord Meadowbank, nor was his learning confined to the studies of his profession; he was a man of universal information; his reading was, during his whole life, extensive; his knowledge accurate; nor did his ardour in pursuit of it terminate but with his life.

Allan Maconochie was the eldest son of a country gentleman, whose family had been driven from Argyleshire, their original habitation, during the Covenanted troubles of the seventeenth century, and settled in Mid-Lothian, where they acquired the estate of Meadowbank, near Kirk Newton. The great grandfather is mentioned in Baillie, (Letters, iii. 365.) as one of Argyle's friends, who had instigated his proceedings, and "was forfaulted," at the time of the murder of that chief, so

<sup>1</sup> It is curious that in the same Session in which this restriction on the speeches of counsel was proposed, a motion was made by Mr. Ewart (March 6th) to give an *additional* speech to the defendant's counsel at *nisi prius*, and in criminal cases on the close of the evidence for the prisoner or defendant; thus following the existing practice of Committees of the House of Commons. The subject was referred, at the request of the Attorney-General, to the Criminal Law Commissioners.

beautifully described by Mr. Fox in his Historical Fragment, as having “expiated his virtues on the scaffold.” The son, grandfather of the Judge, received some indemnity at the Revolution, with which he purchased the estate in Mid-Lothian, with other property, which the possessor sold in 1709, under the alarm then prevalent, that Scotland was ruined by the union. The part of the purchase which was retained proved then to be unsaleable, in consequence of that unaccountable popular opinion.

Allan, the Judge, was born 26th May, 1748, and his father being himself in the profession, took care that his education should be carefully attended to. With this view he obtained for him the assistance of Dr. Adam, afterwards so celebrated as a teacher, and as a writer upon the antiquities and geography of ancient Italy. The young man was the only pupil to whom this eminent and excellent person ever acted as private tutor; and the result of his care was, that the scholar obtained a familiar acquaintance with the ancient languages and the classical writers, very unusual in those days and in that country. Being destined for the bar, under the advice of his kinsman Principal Robertson, who was left one of his guardians upon his father’s death, he studied for some time the Civil and the Scottish law, at the University of Edinburgh; and, in order to complete his education, he entered himself apprentice at the age of fifteen with an eminent writer to the signet (conveyancer), Mr. Thomas Tod, and actually served out his time. But that his studies were never confined to the drudgery of the profession, appears very clearly, for he attended both the class of Divinity and that of Church History; and also the medical classes: nay, so well was he versed in this branch of science, that Dr. Gregory, his intimate friend, used to relate, that a part of his celebrated thesis on taking his degree was the work of Mr. Maconochie. It may safely be asserted that so liberal an education has fallen to the lot of very few men, and of no other lawyer; but he was also improved by foreign travel; and was sent abroad, when he resided for some time at Paris. On his return, in 1769, he entered at Lincoln’s Inn, and kept his terms with the intention of being called to our Bar. Lord Thurlow had taken a liking to him, which continued through life, and strongly urged him to this

pursuit ; but his subsequent marriage with Miss Wellwood, a lady of that well-known Scottish family, induced him to settle in Edinburgh. While he resided in London, however, he very diligently studied the English law, and was a regular attendant upon the Court in which Lord Mansfield presided. The decisions, and the whole judicial conduct of that great magistrate, made a deep impression upon his mind, the rather, as the enlarged views and truly liberal spirit in which he administered our technical system of jurisprudence fell in with his own learned and enlightened views of the science.

He was now called to the Bar, or, as it is said in Scotland, admitted a member of the Faculty of Advocates ; but as practice to young men in the Scottish branch of the profession comes slowly, from there being none of the helps and introductions known among us, of Pleading below the Bar, Sessions, and Circuits, he again went abroad, before his marriage, and fixing his residence in Edinburgh, and remained for between one and two years, diligently attending the proceedings of the Parliament of Paris, and he also spent a considerable time at Rheims, where, and in other provinces, he attended the parliaments or high courts of justice. The copious notes which he wrote both in these countries and during his studies in London, and during his attendance on Lord Mansfield's court, remain a monument of his extraordinary industry ; and a proof that his own great legal learning had been obtained from every source.

On his return to Edinburgh, the first causes that brought him into notice were the great question of literary property in which he was engaged, and the celebrated case of the negro, *Knight v. Wedderburn*, which excited the greatest interest, and called forth all the abilities of the Bar. No questions could be more congenial to his feelings and his tastes, to his principles, above all, for these were eminently liberal and enlarged. He was, with his family, a steady friend of the rights and liberties of the people, as established at the Revolution ; and only became, with Mr. Burke and Mr. Windham, averse to popular courses when these became in this country wedded to sedition, and in France to massacre and anarchy. He not only distinguished himself at the Bar in those celebrated cases which we have mentioned, but on the Bench in all the ques-

tions touching the rights of dissenters, as in the Crangdallie case and others, his ardent love of religious as well as civil liberty shone forth; and his able judgments received ultimately the sanction both of the Court of Session and the supreme tribunal, the House of Lords.

In 1779 he was appointed professor of Public Law; and finding that the duties of this chair had fallen into neglect, he resolved to revive its activity and usefulness. He set himself to prepare, elaborately, a course of lectures; and it must be confessed that few men ever attempted the difficult task with greater resources of learning for executing it satisfactorily, for of few men was the previous reading so extensive, and so various, and none could be more possessed by the wholesome spirit of free inquiry, and the strong desire of investigating the truth. These lectures remain, written, for the most part, in his own hand, and it is exceedingly to be wished that they may, in whole, or in part, be given to the world. For the plan upon which they are framed is most comprehensive: they are written with an extraordinary knowledge of the subject; they abound in proofs of the most extensive reading; and they are throughout guided by a philosophic spirit.

They are arranged under two great divisions — the State of Nature, and the Political State. Under the first, by which is meant the earlier state, are treated, the savage state; the origin of the political union; the first structure of government; language, and the origin of its grammatical structure; the agricultural and pastoral state; the rise of religion and mythology; women and their domestic relations in uncultivated society. The other and principal branch begins with the gradual changes and transitions from the rude to the polished state. It then treats of the pastoral nations with movable habitations; the Nomadic tribes; the origin and nature of the Tartar and Arabic governments; the Nomadic conquests, and the governments thus formed — those of the Israelites, of Persia, of Hindostan, of Turkey. He then treats of pastoral nations with fixed habitations. This leads to a consideration of the rise and progress of European society, the Celto-German governments, and the Gothic governments on the conquered provinces of the Roman empire. Then comes the progress

of government, where the ancient confederacies of pastoral nations have been dissolved. Under this head we have the governments of Greece, especially of Lacedæmon and Athens, and of Italy. Next we have the progress of government where those pastoral confederacies have been consolidated. Those that have been consolidated by the neighbourhood of Nomadic tribes, are Egypt, Assyria, China, Russia, all of which are fully treated. Those which have been consolidated by other causes, as form of the country, superstition, wants of cultivated nations, are Macedon, the monarchies of Western Asia, Thibet, India. The head follows of nations not fully within any of the foregoing descriptions — and, first, nations that never have been pastoral, yet have made progress in civilisation; Mexico, Peru, Japan, and all nations that have made no such progress, and yet have formed a political union; the African tribes, those nations which have acquired knowledge of property, with little or no political union; the Laplanders and Siberians. Next comes a general view of the revolutions in political society; and out of this arises a treatise on the principles of the different forms of government. We are thus, by slow degrees, but from a most comprehensive view of the world and its history, led to the origin, predominancy, and decline of the feudal institution; and then comes the present state of the European governments.

It would not be easy to imagine a more comprehensive plan of this vast subject. We have had access to some of its more interesting portions; as the general disquisitions on the origin of society and of government, and the chapters on the governments of Greece and Rome. The learning of these is profound; the inquiries are conducted with judgment and with uniform acuteness; nor is it to be passed over in silence that the scepticism, or rather the disbelief in the previous opinions respecting the early history both of Greece and Rome, which has formed the creed of the present day, ever since the researches of Niebuhr and his followers, appears to have been familiar to Professor Maconochie as far back as 1779; for we find him representing Romulus as standing in the same relation to the Romans, in which Medus did to the Medians, and Perseus to the Persians. Professor Stewart

had read the chapters on China and Japan, and he described them as both learned and profound; abounding at once with curious information and original disquisition.

After having long been in the possession of extensive practice at the Bar, the professor was raised to the Bench in 1796, upon the death of Lord Abercromby; and the choice was amply justified by the result, for his judicial reputation stands among the very first in the Scottish courts. A profound lawyer; thoroughly versed in every branch of the Scotch law; an acute and discriminating observer of the authorities, whether of text-writers or of decided cases, and skilful to weigh their relative value, never for a moment losing sight of legal principles, in which he was deeply grounded; exhibiting in his judgments a rare union of speculative knowledge with practical experience and readiness; his mind, too, enlarged by an acquaintance with the legal systems of other countries, and a familiarity with the general principles of jurisprudence; possessing, indeed, such a knowledge of other subjects as hardly any lawyer but himself ever had—a knowledge which he oftentimes brought to bear both happily and usefully upon the legal matter in hand—such were the important qualities by which this great Judge was so admirably fitted for his high office. But he likewise shared, in an eminent degree, the other judicial virtues—of patient inquiry, wakeful attention, undeviating integrity, strict impartiality, confidence in his own opinion, without the obstinate adherence to his first impression, which would shut out further light, and preclude a correction of the sentiments originally entertained. The careful attention to every particular of the cases before him, led to a practice of which he set the example, which has been since followed by all his successors, and which is pregnant with the greatest advantages to the due administration of justice—we allude to the delivering Notes of the grounds of his decisions with the judgments pronounced. To this we owe the invaluable lights shed on each case by the present Lords-Ordinary; the stores of legal learning, and of judicial reasoning, wherewithal our reports have been constantly enriched by the Moncrieffs, the Jeffreys, the Fullertons, and the Cuninghams of the day.

It is needless to add, that the weight of this eminent person's authority is very great in the law upon every question with which he had occasion to deal. In the House of Lords none stands higher; and we cite the following just eulogy pronounced upon him in that court of last resort, the rather because Lord Meadowbank's opinion was the ground upon which the Lords overruled a case often cited in the courts below; a case, however, which Lord Meadowbank, with the freedom and the discrimination in weighing authorities already alluded to, had not hesitated to declare bad law. In the important case of *Inglis v. Mansfield*, April, 1835, Lord Brougham gave the judgment of the House connected with that case, and said, "We have the admitted sense of professional men, but above all, we have what is to me the highest authority, and of the greatest weight, that of the late Lord Meadowbank; he having been one of the very best of lawyers, one of the most acute of men, a man of a philosophical mind, a man of great reach of thought, of large general capacity, of great experience, and without exception the most diligent and attentive judge I ever remember in the practice of the Scotch law." His Lordship then proceeds to state, his having introduced the most useful practice of appending notes to interlocutors, in one of which is found Lord Meadowbank's unhesitating opinion against the authority of *Houston v. Stuart*.

Lord Meadowbank never gave any work to the world, except his able and profound dissertation, in the *Transactions of the Royal Society of Edinburgh*, upon the Origin and Formation of the Feudal System; and a tract of great merit, and much practical use, upon the Application of Jury Trial to Scotch Civil Proceedings, in 1814. Of the latter work, Lord Eldon formed a very high opinion, and expressed himself to this effect in a letter which is now before us. He particularly mentions "his surprise at the accurate knowledge of English jury proceedings." But he was probably not aware of the English law education which the author had received, as we have already stated. In 1815, he was appointed one of the Judges of the new Jury Court, then established; and in this as in all other departments of his judicial duty he

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gave unbounded satisfaction both to his colleagues, to the profession, and to the suitors.

For many years of his life, Lord Meadowbank, always fond of mechanics and other experimental researches, had devoted much of his spare time to agricultural pursuits, in which he was knowing and skilful. His health was, generally speaking, good, and he passed on his farm, and among his books, all the hours which he could take from his professional occupations. But about the year 1814, it began to fail, and for the last few months of the two years that he still lived, he was confined to the house, and only could take an airing in the carriage. It is, however, singular, that not only his cheerful temper and lively disposition remained unaltered, but it was seen how eager and how active his mind continued to the last. His faculties were wholly unimpaired; and the ardent desire of knowledge and fondness for argument and discussion abode by him to the end. Within a few days of his decease, he desired strict inquiry to be made after two works which he had seen advertised in the newspapers; and aware how nearly he approached his end, he expressed some disappointment at finding that they were not yet published. One of the last incidents of his life, and which gave him extreme satisfaction, was the elevation of his eldest son, then Solicitor-General, to the head of his profession, as Lord Advocate. He died 14th June, 1816, in the 69th year of his age, leaving, with the Lord Advocate (since a Judge by the same title with his father), Robert, in the East India Company's service, both still surviving, and James, a Scotch barrister, and a man of much curious and accurate learning, who died early in the present year. Thomas, in the profession of the Law, died in the year 1816.

It remains to add, that, in private life, no man could be more amiable in all respects. His strict and undeviating integrity, his high sense of honour, the kindness of his nature, and the strength of his attachments in all the relations of society, both towards his family and his friends, were without an exception or a blot. He delighted to assist the young and inexperienced with his counsels, and opened to them freely the stores of his great knowledge. He was fond of

discussion, and though unyielding in argument, he was a fair and well-natured disputant. The difference which he had with his old and intimate friend, Dr. Gregory, lasted a few years, and was succeeded by a renewal of all their ancient intimacy; but it was only one of the many estrangements which were incident to the social intercourse of that eminent and gifted, though somewhat eccentric, individual. Lord Meadowbank's kindness, however, was not within the circle of his connections, confined to his disposition, his temper, or his advice. He was, to the extent of his means, and even beyond it, helpful to the relatives who stood in need of his assistance, as appears by the correspondence which remains, and as never was otherwise known.

We have deemed that we discharged a duty to the legal profession in bringing before our readers the studies and the actions of this distinguished Judge, the rather because they illustrate the position often lost sight of by busy men, and not comprehended by men of narrow minds, that all the liberal arts are mysteriously related, having what Tully calls "*quoddam commune vinculum*;" that no man can justly be regarded as an accomplished lawyer whose knowledge is closely confined to the lore of his own profession; and that the student, the practitioner, the administrator of the law, may most usefully enlarge their understanding, from branches of general learning, without any risk whatever of becoming less skilful in their own art, or less successful in its practice.

## ART. VI. — ON THE LAW RELATING TO CONDITIONS OF SALE.

NO persons experience more surprise than the owners of landed estates, when they are informed that the property which they have enjoyed for a long course of years, either by descent from an ancestor, or by undisturbed transfer from a former owner, is in point of law totally unmarketable. The general ignorance respecting the nature of titles and the principles of tenure leads such parties to imagine, that estates, of which they are the lawful owners by every moral right, are therefore accompanied by an equally unquestionable legal title. But a long series of decisions in Courts of Equity upon suits for the specific performance of contracts, whether for the sale or for the purchase of lands, has established a contrary conclusion, and rendered it an imperative precaution on the part of every vendor, that his title should undergo a strict technical investigation before he offers his estate for sale. By such means a well-advised vendor is saved from entering into fruitless contracts; while he avoids the still greater disadvantage and probable loss arising from the condemnation of his title by a court of justice, and from the inducements or opportunities thus afforded for the preferment of adverse claims resting upon flaws unadvisedly exposed. He is thus enabled beforehand to impose such restrictions on a purchaser, and to reserve such rights to himself, as shall effectually obviate the difficulties and perils to which we have alluded: or otherwise to refrain from offering his estate for sale with a doubtful or unmarketable title.

Special conditions of sale have hence derived their origin: and when the language in which they are clothed, and the points to which they relate, are carefully digested and selected, the result is of great value to the vendor. Such conditions, however, are often inartificially and illogically drawn; they frequently proceed upon an insufficient knowledge of the title to which they relate, and not seldom exhibit a very limited

apprehension of the effects or consequences which will result from the conditions themselves. In point of form they fluctuate as widely as last wills and testaments ; and on many occasions they have been productive of so much litigation and mischief, that an unreserved or unconditional sale would probably have been less detrimental to the parties concerned. It appears also from Sir Edward Sugden's denunciation of the practice, that auctioneers were formerly employed or allowed to prepare the conditions of sale : but that learned writer advises that a vendor should never permit such a course of proceeding, as continual disputes had arisen from the mis-statements consequent upon their ignorance of the title. This practice has probably now ceased ; but in consequence of the want of fixed precedents applicable with the same facility as common forms in conveyances, great uncertainty has prevailed as to the interpretation of the conditions most frequently used, and the best mode of rectifying the errors which they contain.

Such conditions, however, are not, in our apprehension, necessarily accompanied by all their present dangers and imperfections. The preparation of such conditions in an effectual form is doubtless an exercise of the utmost skill and knowledge of the conveyancer. But the subject will probably be matured by the various decisions of the courts into something like a systematic shape, in the same way as the established forms of conveyancing have acquired their present accuracy and precision : and in the mean time the construction of a well-digested code of conditions applicable to all the ordinary emergencies of vendors and purchasers, and expressed in language of definite legal import, would be a task worthy of the highest learning and attainments in the doctrines of real property.

In *Hyde v. Dallaway*<sup>1</sup>, Lord Langdale, M. R., observed on the difficulty which the Court sometimes had in dealing with special conditions of sale. "On the one hand it was hard to say that parties should not enter into contracts suited to their convenience and to the exigency of their titles ; but, on the other hand, conditions of sale were sometimes of

<sup>1</sup> 4 Beav. 606.

such a nature, that it was scarcely practicable to carry them into execution, consistently with the settled principles of Courts of Equity."

In cases, therefore, of this sort, the leaning of the Courts of Equity is most strongly against the vendor, and every opportunity is taken of remitting a purchaser to his original or ordinary rights as derived from an unconditional contract. "If a vendor," says Vice Chancellor Knight Bruce, "means to exclude a purchaser from that which is matter of common right, he is bound to express himself in terms the most clear and unambiguous; and if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor."<sup>1</sup> Vice Chancellor Wigram has likewise made the following observations on the same subject. "I have no hesitation in saying that I think conditions of sale like those before me, (the meaning of which no purchaser knows until *ex post facto* decisions of a court of justice inform him of it,) ought to be discouraged, and that I am but offering such discouragement by putting a strict construction upon them in favour of a purchaser, and by holding that they are not to have a construction which might subject purchasers to a great expense and inconvenience at the mere will of a vendor."<sup>2</sup>

In some cases the vendors have secured to themselves the most unlimited protection, by expressly selling their estates with such title only as they actually possess; and this condition will be upheld against the purchaser, unless he can show that the language is ambiguous, or otherwise insufficient. Thus in *Freme v. Wright*<sup>3</sup>, the assignees of a bankrupt contracted to assign his interest in certain property, *under such title as he lately held the same*; and although the title was defective, the Vice Chancellor, Sir J. Leach, decreed a specific performance against the purchaser. His Honor said, that "although a party proposing to sell an estate without qualification asserts in fact that it is his to sell, and that he has a good title, yet he may, if he thinks fit, contract to sell

<sup>1</sup> 1 Yo. & Coll. C. C. 490.

<sup>2</sup> 2 Hare, 115.

<sup>3</sup> 4 Madd. 364.

such title as he has ; and the question is, whether he did make such a contract."

With vendors who are *sui juris*, and selling on their own account, it is of course always optional whether they will annex special conditions to their contracts, or make an unqualified sale at all hazards. But with some parties, as, for instance, assignees of bankrupts, it is absolutely necessary that they should sell under special conditions : for though Lord Rosslyn in *Pope v. Simpson*<sup>1</sup> thought that assignees saying nothing about their title were to be considered as selling only the interest which the bankrupt had ; yet Lord Eldon in *Deverell v. Bolton*<sup>2</sup>, said, "my clear opinion is that advertising to sell a freehold estate, they undertake, whether they say so or not, to make a title."

Again, with respect to lessees selling their leases, it is often highly prudent or expedient to deprive the purchaser of his ordinary right to call for the lessor's title. Sales of leasehold property may be defeated by the vendor's inability to produce the lessor's title ; and the only remedy for this difficulty is to annex to the sale a special condition, that the vendor shall not be obliged to produce such title, or that the purchaser shall take the lessee's title, notwithstanding the non-production of the lessor's title.

In *Ord v. Noel*<sup>3</sup>, it was laid down by Sir J. Leach, Vice Chancellor, that a trustee selling an estate by auction is bound to exercise the same degree of caution as a provident vendor would have used in the sale of his own property. It may therefore be presumed that where a title is in such a state, that if the property were put up to sale, without restrictive conditions, the contract could not be carried into effect, unless at the risk of litigation, or under the probability of great expense to be occasioned by the requisitions of the purchaser, trustees would not only be justified in imposing special conditions, but would be in danger of being held liable as for a breach of trust, if they abstained from taking such precautions. Such a liability may be obviously prevented by timely investigation of the title previously to the sale.

In reference to the sale of leasehold property under special conditions, and particularly under a condition restraining the

<sup>1</sup> 5 Ves. 145.

<sup>2</sup> 18 Ves. 505. 512.

<sup>3</sup> 5 Madd. 438.

purchaser from requiring production or proof of the lessor's title, "there is no doubt," says Lord Eldon<sup>1</sup>, "that purchasers upon such sales will not bid so readily, and will be very cautious and wary; but the necessity of requiring vendors to advertise what they mean to sell arises from this, that it is quite impossible for a Court of Equity specifically to perform the contract of a vendor, admitting that he did not choose to describe the subject as it was, lest an honest disclosure of its actual state should put it into the hands of the vendee at a lower price. A Court of Equity cannot lend its assistance to such a purpose. The answer, therefore, to all the difficulty said to be imposed on lessees selling their leases is, that there is no difficulty which they do not create themselves, by not advertising the purchasers how they can deal with the subject, when they come to execute the contract."

Trustees, however, and other vendors clothed with fiduciary characters, are embarrassed with another difficulty; for though they are not only at liberty but under obligation to sell under such special conditions as shall secure the contract from failure on account of gross or irremediable defects in the title, yet if they make a sale accompanied by conditions tending to depreciate the property, or to chill the competition of bidders at the sale, it will be deemed a breach of trust, and the loss thus occasioned to the trust estate will be thrown upon the trustees. "I very much doubt," said Sir William Grant, M. R., in *Wilkins v. Fry*<sup>2</sup>, "whether assignees would be justified in clogging the sale with covenants and conditions, *reducing the value* of the property, which it is their duty to make the most of, for the benefit of the creditors." Every such case must of course be judged by its own special circumstances; and we apprehend that no general definition can be given of conditions which may be termed depreciatory. There has, however, been one recent decision on this subject, in the case of *Hobson v. Bell*<sup>3</sup>, where a reversionary interest in stock was put up to sale by the mortgagee; the special conditions were, that all objections should be stated and delivered within a limited time;

<sup>1</sup> 18 Ves. 512.

<sup>2</sup> 2 Rose, 371. 375.

<sup>3</sup> 2 Beav. 17.

that the purchaser should not require any other person than the vendor to concur in the assignment, and that all copies of deeds, &c. should be obtained at the expense of the purchaser. The Master of the Rolls was of opinion that those conditions were not of such a depreciating character as to amount to a breach of trust or constitute an objection to the title.

There is great reason, however, to believe that a sale is seldom or never damped by the mere terms of the conditions which accompany it. Few ordinary or unprofessional purchasers trouble themselves so much as to look at the conditions; and those who do, are generally so incapable of estimating their effect, that they lay them aside as altogether unintelligible.

Conditions of sale are readily divisible into the following three classes: Conditions *Preliminary*, Conditions *Concurrent*, and Conditions *Posterior*. And we shall proceed to consider each of these three classes of conditions successively.

I. Conditions *preliminary* usually relate, first, to the biddings, and secondly, to the execution of the contract.

1. In conditions relating to the biddings it is usually provided that no person shall bid less than a given sum at one time, or retract any bidding after it has been made; that the highest bidder shall be the purchaser; and that in case of a dispute between two or more bidders, the estate or property shall be immediately put up again for resale. Without a stipulation against the retraction of biddings, a bidder at common auctions has a *locus pœnitentiæ* until the auctioneer's hammer falls; for a bidding is merely an offer, and is not matured into an obligation until the vendor has accepted it.<sup>1</sup> In sales, however, of land, a purchaser is further protected, and is not concluded by any offer until he has signed a written contract.<sup>2</sup>

With reference to the obligation of biddings, it has been decided that where a party bids by mistake for one lot or estate instead of another, he will, upon satisfactory evidence of the mistake, be relieved from the contract. This occurred in *Malins v. Freeman*<sup>3</sup>; where the defendant intending to

<sup>1</sup> *Payne v. Cave*, 3 T. R. 148.

<sup>2</sup> *Malins v. Freeman*, 2 Keen, 25.

<sup>3</sup> 2 Keen, 25.



bid for one estate bid by mistake for the plaintiff's property, which was sold by the same auctioneer, on the same day, and at the same time and place: and, independently of a question whether the person by whom the contract had been signed as the agent of the defendant had sufficient authority for so acting, Lord Langdale M. R., being satisfied with the evidence of the mistake, dismissed the plaintiff's bill for specific performance. "The defendant," said his Lordship, "may be answerable for damages at law, without being liable to a specific performance in this Court. In cases of specific performance the Court exercises a discretion, and knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not in all cases decree a specific performance; as in cases of intoxication, although the party may not have been drawn into drink by the plaintiff. . . . And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the Court will relieve, for the Court is not here called upon to relieve the defendant from his legal liability; but whether, if the mistake be proved, the Court will enforce a specific performance, leaving the defendant to his legal liability. And I think that if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed; and after giving to the evidence the best consideration in my power, I am of opinion that the defendant never did intend to bid for this estate. He was hurried and inconsiderate; and when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that by his conduct he has occasioned some loss to the plaintiff: for that he is answerable, if the contract was valid, and will be left so notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law."

2. In consequence of the necessity of a written contract for the validity of a sale of lands, conditions of sale usually require the purchaser to sign within a limited time an agreement for the completion of his purchase; and this stipulation

has been decided to be fulfilled as against a purchaser, by the entry of a memorandum in the auctioneer's book with the purchaser's name annexed; the auctioneer having been held to be by implication an agent duly authorised to sign a contract on behalf of the highest bidder.<sup>1</sup>

The general law relative to the sufficiency of signature by agents will be found at large in Sir Edward Sugden's well-known treatise on Vendors and Purchasers.

II. Conditions *concurrent* are of two kinds: —

(I.) Restrictive: (II.) Remedial.

(I.) Conditions restrictive: —

Conditions of this class fluctuate very much, according to the vendor's own apprehension of the exigencies of his title. But there are two kinds of restrictive conditions which are in very common use. The one usually provides that all recitals of births, deaths, marriages, heirships, intestacies, successions, and matters of pedigree, and *other facts*, contained in documents anterior to a given date, shall be conclusive evidence of the matters so recited. The other is adopted in order to limit the vendor's liability to the production of deeds and documents.

1. In regard to conditions rendering recitals conclusive evidence, Mr. Jarman has made the following valuable observations<sup>2</sup>:— "Care should be taken, before this is done, to ascertain that the recitals or statements in the title deeds are all unambiguous and consistent with each other, for any inconsistency of statement as to a particular fact would, of course, amount to a deficiency even of such evidence as by the condition the purchaser is entitled to have, and would give him a right to call for the ordinary evidence of that fact. It may be doubted also, considering the rigour with which restrictive conditions of sale are construed as against the vendor, whether, unless the language of the condition clearly expressed such an intention, it would be extended to bind the purchaser to accept recitals as evidence of *conclusions of law*. Whether, for example, under a condition that all recitals of facts and matters of pedigree, in deeds of twenty years old or upwards, should be sufficient evidence of the facts and mat-

<sup>1</sup> White v. Proctor, 4 Taunt, 209. Kemys v. Proctor, 3 Ves. & B. 57.

<sup>2</sup> 9 Jarman's Conveyancing, pp. 3, 4.

ters recited, a purchaser would be bound to accept a mere recital that J. S. was the heir-at-law of E. T. as evidence of that fact, which, it will be observed, is something more than a matter of pedigree, being a conclusion of law, often not of easy determination, from circumstances which alone are strictly matters of pedigree; for, under the same pedigree, J. S. may be the heir-at-law of E. T. as to one estate and not his heir as to another. The proper construction of a condition making recitals evidence of the facts and matters recited, would seem to be, that the recitals must state every fact and matter which, in the absence of such a condition, counsel advising on the title would require to be stated on the abstract, and to be proved, in order to enable him to draw the required conclusion. When it is considered how very seldom a recital of an heirship, unless it be of the simplest character (as that A. was the eldest son of B.), contains a complete statement of the pedigree and other matters necessary to support such a conclusion, the expediency of framing conditions of this nature in a more special manner than is usual will be apparent."

The foregoing remarks are in part confirmed by a decision of Vice Chancellor Knight Bruce in *Symons v. James*<sup>1</sup>, where the condition being, that all recitals or statements of descents, deaths, payments of money, heirships, intestacies, and other facts, in deeds bearing date twenty years prior to the day of sale, shall be deemed conclusive evidence of such facts, His Honor held, that a recital of a seisin was not protected by the condition — a seisin being not itself a fact but a conclusion of law deducible from ascertained facts.

It should be observed, also, that an abstract is not complete merely by the exhibition of a given number of facts on the face of the deeds or in the recitals. To give those facts their proper legal effect further particulars are often necessary, and special conditions do not usually extend to restrict the purchaser from requiring such additional evidence. The death of a tenant for life, or of a wife or a child, may be a material feature in the title; but the exact time, or place, of such an event, and its relative priority to other events, may be

<sup>1</sup> 1 Yo. & Coll. C. C. 487. Not reported on this point.

a still more essential element of the purchaser's safety. Therefore, although the purchaser may be precluded from requiring evidence of the simple fact, we presume that he may, unless specially restricted, call for proof of incidental circumstances like those to which we have alluded.

2. In reference to conditions restrictive of the purchaser's right to call for deeds or other documentary evidence, it has been decided that where the conditions are so expressed as merely to restrain a purchaser from requiring the deduction of such a title as he would have had a right to require in the absence of the restrictive stipulations, the purchaser is *not bound to accept a defective title*: and the conditions merely operate to protect the vendor from suits and actions, in case of his failing to make out a marketable title. They relieve the vendor from the obligation of making out the good title, but do not oblige a purchaser to accept a bad one.

This appears by the case of *Hyde v. Dallaway*<sup>1</sup>, where the sixth condition of sale was as follows: "All the statements and recitals in any deed or document abstracted or recited in a deed or document abstracted, shall be held conclusive evidence of the facts and circumstances, and of the contents of the documents stated and recited; and the vendors *shall not be required to produce any further evidence* of the same, or to deduce the representation to any trustee in whom a term, or other legal estate, has been vested, or to get in any such legal estate, *or to procure the concurrence in the sale or conveyance of any parties interested in the equity of redemption of the property sold*, or to produce any deed or document not in the vendor's possession: and all certificates of births, burials, and marriages, and all declarations and copies of deeds, &c., surrenders and conveyances of outstanding legal estates, shall be at the expense of the person requiring the same; and the completion of the purchase shall not be delayed till such outstanding estate can be got in." The defendant became the purchaser, and resisted the specific performance of the contract, on the ground that the title was imperfect without the concurrence of the parties interested in the equity of redemption. On the cause coming on to be heard, Lord

<sup>1</sup> 4 Beav. 606.

Langdale, M. R., did not treat the condition as conclusive between the parties, but made the usual reference to the Master to enquire whether a good title could be made according to the conditions. A similar decision was made in *Flower v. Hartop*<sup>1</sup>, where, by one of the conditions of sale, the purchaser was *not to require further evidence* of the identity of the parcels than that which was supplied by the abstract and the deeds. The description in the abstract did not correspond with that in the particulars, and Lord Langdale, M. R., held that the variance must be explained before a decree for specific performance could be made.

A decision apparently militating in some degree against the cases just quoted was made by the Court of King's Bench in the case of *Spratt v. Jeffery*<sup>2</sup>, where it appeared that the contract contained the following clause: "And the said William Spratt doth hereby agree to accept a proper assignment of the said leases and premises as above described, *without requiring the lessor's title.*" The Court held that the vendor contracted to sell only a qualified title: but the propriety of this decision seems to have been questioned by the Court of Exchequer in *Shepherd v. Keatley*.<sup>3</sup>

In like manner, where the conditions provide that the purchaser shall not be at liberty to call for the production of certain specially excepted deeds, it has been decided that he will not be compelled to take a doubtful title exhibited by the deeds actually produced. In *Dick v. Donald*<sup>4</sup>, Lord Lyndhurst C., in reference to this point, said, "As to the condition with respect to the title deeds, I never heard that because the vendor provides by the conditions of sale that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds." The same principle was followed by Lord Chancellor Cottenham in *Southby v. Hutt*<sup>5</sup>, where a question arose upon the conditions of sale, whether the plaintiff, the vendor, was or was not bound to verify the abstract of his title by producing, for the inspection of the defendant or his solicitor, the several documents mentioned in the abstract, or by furnishing other

<sup>1</sup> 7 Jur. 613.<sup>2</sup> 10 B. & C. 249.<sup>3</sup> 1 Cro. M. & R. 117.<sup>4</sup> 1 Bligh, 655. N. S.<sup>5</sup> 2 Myl. & Cr. 207.

satisfactory evidence. The conditions of sale, so far as they were material to the question between the parties, were the following:—“4th. That the vendor will, at his own expense, deliver an abstract of the title to the purchaser or his solicitor of the first seven lots and lot 33 within twenty-one days from the day of the sale, and *deduce a good title*; but as to such parts of the land as were allotted or taken in exchange under the award of the commissioners of the Appleton inclosure, the purchaser shall not be at liberty to require, and the vendor shall not be bound to show any title thereto prior to the said award, from which period the title to such lands will be deduced. “6th. The vendor . . . . . shall not be bound, or required to produce any original deed or other documents than those in his possession and set forth in the abstract, or which relate to other property.” The vendor contended that, notwithstanding the terms of the 4th condition, he was relieved by the 6th condition from verifying the abstract, except so far as he was able to do so by the production of deeds and documents in his own possession. But Lord Chancellor Cottenham overruled this construction; and held that the vendor had by the 4th condition expressly contracted to *deduce* a good title, and that if the vendor were not bound to verify any part of the abstract, the deducing and exhibiting a good title on paper would be mere mockery and delusion. His Lordship held also that the latter words of the 4th condition put a construction on the word “*deduce*,” and proved that it meant not only to exhibit on paper, but to *deduce and show* a good title; for, as to certain allotments, an exception to the generality of the obligation to deduce a good title was introduced; and that it would be absurd by means of the 6th condition to convert a positive contract for a good title into a contract under which the purchaser might be obliged to take the estate without any title at all, and certainly without any means of proving a title. His Lordship therefore directed a reference to the Master to enquire whether the vendor could make a good title.

In *Southby v. Hutt* there was this peculiarity, that the vendor had expressly undertaken to deduce a good title. But it may be suggested that such an undertaking, though

not expressed in words, is by law implied in every contract of sale, where the contrary intention is not explicitly declared<sup>1</sup>; and that the Court will not infer such intention from any ambiguous expressions, so as to enable a vendor to force an imperfect title upon a reluctant purchaser.

3. Another rule applying to such conditions is, that a purchaser is at liberty to raise objections founded on information derived *aliunde*, and that he is not confined to objections suggested by or necessarily deducible from the abstract. That document may be unexceptionable on the face of it, or within the purview of the conditions of sale; but an existing flaw in the title, however discovered, must be removed before the vendor can enforce his contract.

This was decided by the Court of Exchequer in the case of *Shepherd v. Keatley*<sup>2</sup>, where one of the conditions of sale of leasehold estate was as follows: — “The vendors shall deliver an abstract of the lease and of the subsequent title under which the leasehold lots are sold, *but shall not be obliged to produce the lessor’s title.*”

The abstract was duly delivered, and an assignment was subsequently tendered to the purchaser for his execution: but he refused to accept it, on the ground of certain defects discovered *aliunde* by the purchaser in the lessor’s title. The vendor thereupon brought an action for breach of contract: and by consent of the parties the facts were turned into a special case to be argued before the Court of Exchequer. In the course of the argument, Lord Lyndhurst C. B. said; “The question is, not whether the plaintiffs were bound to produce the lessor’s title, but whether the defendant was precluded from taking objections to it:” and in delivering judgment his Lordship said, “The whole case depends on the construction of the words, ‘shall not be obliged to produce the lessor’s title:’ and it seems to me that those words mean nothing more than that there shall be no obligation upon the vendor to produce, for the satisfaction of the purchaser, any evidence of lessor’s title. . . . . The construction put by the

<sup>1</sup> See the judgment of Lord Chief Baron Richards in *Purvis v. Rayer*. 9 Price, 488. See also *Souter v. Drake*, 5 B. & Adol. 992.

<sup>2</sup> 1 Cro. M. & R. 117.

Court upon the words used in *Spratt v. Jeffery* was, that they operated as a waiver of the objection. But there is nothing to show that the parties in the present case had any intention of the kind. I do not say what my own opinion would have been upon the words in *Spratt v. Jeffery*. It is sufficient to distinguish them from the words here used." Mr. Baron Alderson likewise said: "*Spratt v. Jeffery* was a case not merely of producing the lessor's title, but a waiver of that title altogether. Possibly upon the words there used, I might not have come to the same conclusion as the Court of King's Bench did, but it is unnecessary to give any opinion upon that point, as those words differ from the expressions employed here. The not being 'obliged' to produce the lessor's title, merely confers upon the vendor the power of enforcing the contract, without producing or giving evidence of that title; but that expression cannot prevent the purchaser from taking objections discovered by himself."

4. Where restrictive conditions of sale are prefaced or accompanied by a statement of facts or circumstances constituting the grounds or inducement for imposing a restriction upon the purchaser's right of enquiry, the purchaser, unless expressly precluded by the condition itself, has a right to call for evidence in support of the inducement thus put forward.

This was decided in *Symons v. James*<sup>1</sup>, by the Vice Chancellor Knight Bruce. The sale took place under a decree, and the property was sold in lots. With respect to Lot 24 the 15th condition of sale was as follows:—"That as Lot 24 consists of a variety of allotments, which were awarded in the year 1784 to Robert Macreath, Esquire, or his tenants, in respect of the manor, or some part or parts of the manor of East Brent, or of the lands held therewith, of which he was then the owner, which manor, together with such allotments and all lands held therewith, was subsequently purchased by the said George Symons; the title of vendors to the said manor shall be conclusive evidence of their title to the said Lot 24, and the vendors shall not be required to identify such lot with any part of the lands held with the manor, and conveyed to the said George Symons with the manor."

<sup>1</sup> 1 Yo. & Coll. C. C. 487.



The twenty-fourth lot was sold, and an abstract of title was delivered to the purchaser, with the following title prefixed:—“An abstract of the title of the devisees of George Symons, Esq., to four closes of freehold land, situate in Mark Moor, in the parish of Mark, in the county of Somerset, consisting of allotments No. 587 to 609, both inclusive, on the Mark Moor Inclosure award plan, and being Lot 24 in the particulars of sale.” The abstract set out various documents, from which it appeared that a Mr. Dawes purchased the manor and lands from Mr. Macreath, made a conveyance to Symons, by which only eighteen allotments were conveyed in express terms to Symons. The Master having reported in favour of the title, the purchaser took an exception, objecting that a good title had not been shown to twenty-three allotments, according to the terms of the fifteenth condition of sale. The vendors contended that the latter clause of the condition saved them from the obligation of identifying the allotments, and relied on the probability that in consequence of change of boundaries, the eighteen lots specified in the conveyances were the only allotments remaining as they were originally allotted, but that the whole twenty-three lots were actually included in the deeds. But the Vice Chancellor said he was not convinced that the vendors had discharged themselves from that obligation which was incumbent upon a vendor in circumstances of this description: and His Honor proceeded thus:—“The fifteenth condition of sale, as a reason for imposing certain terms upon a purchaser, makes two assertions of fact. Whether the purchaser is or not to be bound by the condition must depend upon the accuracy of those two assertions in point of fact. The first assertion is, that Lot 24 consists of a variety of allotments which were awarded in the year 1784 to Robert Macreath, Esq., or his tenants, in respect of the manor,” and so on. The second assertion is, “that the manor, together with such allotments, and all lands held therewith, was subsequently purchased by George Symons.” Now, it appears to me, that it is incumbent upon the vendor to give evidence of those two matters of fact, and that to hold, that by reason of the condition following those assertions, the vendor is relieved

from proving them, would not be fair or reasonable as between vendor and purchaser. . . . . I apprehend that any ordinary reader of this fifteenth condition of sale would read it as importing that whatever Macreath had went to Symons. . . . That, however, is not so, for it appears that much of what Macreath had did not go to Symons. I apprehend that according to every rule which ought to guide a court in deciding a question of this description between vendor and purchaser, I must hold, that the purchaser is entitled to more evidence than he has hitherto received. . . . . I shall not either allow or overrule the exception, nor shall I part with the deposit, but I shall refer it back to the Master to review his report; and in reviewing his report let the Master enquire whether the lands contained in Lot 24 were comprehended in the conveyance from Dawes to Symons. And let the Master have regard to any evidence which may be laid before him as to the enjoyment of Lot 24 since the year 1792."

(II.) Conditions *remedial* are usually, 1. Rescissory; and 2. Compensatory.

1. *Conditions Rescissory.* Special conditions of sale generally contain a clause requiring all objections to the abstract to be stated within a limited time, and authorising the vendor, in case of his inability to remove them, to rescind the contract.

According to Sir Edward Sugden<sup>1</sup>, the late Mr. Bradley recommended that where it is understood at the time of sale that the vendor has only a doubtful title, a provisional clause to the following effect should be inserted in conditions of sale and articles of purchase, which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale:—"That if the counsel for the purchaser shall on the examination of the title be of opinion that a good title and conveyance cannot be made of the purchased premises within the time limited by the articles for carrying the same into execution; in that case the same articles shall be discharged, and not further proceeded in on either side."

Conditions founded on this principle are now in constant use; but owing to the various forms in which clauses of this

<sup>1</sup> 1 V. & P. 43.

kind have been worded, and to the conduct of the parties to the contracts, much litigation has ensued.

Upon conditions of this class it has been decided ;

(1.) That where a vendor, having an option by the conditions of sale to rescind the contract in case of objections being made to the title, receives objections from the purchaser, and undertakes to remove them, the power of rescission is waived ; and if the vendor, after thus entertaining the objections, should find himself unable to remove them, he will not be allowed to fall back upon the conditions of sale and rescind the contract, but will be placed in the same situation as if the contract had been originally unaccompanied by any such condition.

Thus in *Tanner v. Smith*<sup>1</sup>, which was a suit by vendors for specific performance, it appeared that by one of the conditions of sale the abstract was to be delivered to the purchaser or his solicitor within twenty days after the sale ; and by another condition (the 7th) it was provided, that if the purchaser should raise objections to the title, which the vendors should not be able or willing to remove, and the purchaser should insist upon such objections, the vendor *should be at liberty by writing under his hand to rescind the contract*, on repaying to the purchaser his or her deposit money, without interest or costs ; and that all objections which should not be taken, in writing, within ten days after the delivery of the abstract, should be considered as waived. The abstract was delivered within the twenty days ; and within the next ten days the defendant sent to the vendors several written objections to the title. Upon this, the vendors intimated that the objections should be removed, and that a further abstract should be forthwith supplied, for the consideration of which ten more days would be allowed. Before the further abstract was delivered, the time for completing the sale had expired ; and the defendant and purchaser had brought an action to recover his deposit. On a motion to restrain the action, the construction of the 7th condition came into question before the Vice Chancellor of England ; and His Honor, after observing that it appeared to him to be a new condition, gave the following decision :—“ My opinion is, that when objections to the title have been delivered

<sup>1</sup> 10 Sim. 410.

within the ten days, then the vendors shall have the power of determining which of two courses they will adopt; that is, whether they will endeavour to remove or answer the objections, or whether they will put an end to the contract altogether. If they are either unwilling or unable to remove the objections, then they must pay back the deposit money, without either interest or costs. . . . If the vendor once elect to answer the objections, they are for ever thereafter precluded from exercising the option given to them by that condition, to rescind the contract." His Honor is further reported to have said, in the same case, "It seems to me a condition which is capable of being exercised at one time only. When objections are delivered, . . . if the vendor says that he is able and willing to remove them, he is excluded at any time afterwards, whether upon the same objections or future objections, from availing himself of that condition to rescind the contract, on the ground that he is not able or willing."

In *Morley v. Cook*<sup>1</sup>, in which the purchaser filed a bill for specific performance, the 6th condition of sale contained the following clause: "In case any of the purchasers shall raise objections not herein provided for, and which the vendor shall not be able or willing to remove, the vendors shall be at liberty to rescind the contract, by writing under their hands, on repaying to such purchaser or purchasers his or her deposit, without interest, costs, or further compensation; and all objections not made in writing, and delivered to the vendor's solicitor, within fourteen days after the delivery of the abstract shall be treated as waived; and in this respect time shall be deemed the essence of the contract."

The sale took place on the 14th of January, 1841; and on the 25th, the vendor delivered an abstract, which was returned with queries and requisitions. The abstract was re-delivered with answers to the questions on or before the 17th of February, on which day the purchaser objected to the answers as insufficient. A correspondence and treaty then ensued between the parties in reference to the title until the 25th of March, when the vendor's solicitor gave

<sup>1</sup> 2 Hare, 109, 110. note.

notice that if the purchaser was unwilling to complete the purchase upon the title then shown, the vendor would avail himself of the 6th condition of sale to rescind the contract, and he thereby rescinded the contract accordingly.

The Vice Chancellor Wigram held the case to be concluded by the decision of the Vice Chancellor of England in *Tanner v. Smith*<sup>1</sup>; and gave his opinion that a treaty between the vendor and purchaser for the completion of the title by the former, after the purchaser's objections have been taken to the abstract, ought to be deemed a waiver of the condition; and that in equity, as well as at law, the condition once waived is gone for ever.

Upon the same point, Sir John Leach said, in *Minchin v. Nance*<sup>2</sup>, "You cannot put an end to a contract under such a condition but at the first moment; and after permitting the other party to proceed, you cannot turn round and say, now I will put an end to the contract."

In *Cutts v. Thodey*<sup>3</sup>, the Vice Chancellor of England followed his own former decision in *Tanner v. Smith*, and held that a vendor who enters into discussions with a purchaser respecting the objections to the title, waives his rescissory right, and all benefit of the purchaser's waiver or constructive waiver of such objections.

It is to be presumed, therefore, that when a vendor, by treating for the completion of his title after objections taken, has waived his right to rescind under the condition, all parties are, in the absence of special circumstances, remitted to the ordinary rules of a Court of Equity, in reference to questions of title, unfettered by the particular conditions of sale.<sup>4</sup>

But where a purchaser contends that if the vendor make any addition to the abstract first delivered, a new period of time corresponding with that mentioned in the condition begins to run in the purchaser's favour from the time of delivering such addition, then it is also presumed that the vendor's right of rescission will likewise recommence *de novo*; as the vendor's power to rescind the contract under the condition must be coextensive with the purchaser's right to object to the title under the same condition.<sup>5</sup>

<sup>1</sup> 10 Sim. 410.

<sup>2</sup> Cited 4 Beav. 277.

<sup>3</sup> 6 Jurist, 1027.

<sup>4</sup> 2 Hare, 113.

<sup>5</sup> See per Wigram V. C. 2 Hare, 113.

The vendor, however, has it in his power, by a proper mode of framing the conditions of sale, to reserve to himself the right of rescinding the contract after entering into correspondence or explanations regarding the purchaser's objections; and considering the course of the decisions respecting the vendor's rescissory power, it appears to us that such an addition to the terms of the conditions of sale would be extremely prudent, as removing at least one ground of controversy and litigation.

(2.) There may, notwithstanding, be circumstances, under which a treaty or correspondence respecting objections will not affect the vendor's right of rescission. This occurred in the case of *Page v. Adam*<sup>1</sup>, in which the purchaser had filed the bill for a specific performance of the contract. By the 5th condition of sale, it was required that the purchaser should, within twenty-eight days next after the delivery of the abstract, state in writing and transmit to the vendor's solicitors all objections to the title shown by such abstract, and all requisitions in respect thereof; . . . "and if any such objections are made, and *not removed* within fourteen days after the expiration of the twenty-eight days herein named, that then, or *at any time thereafter, the vendor shall be at full liberty* (by notice in writing to be delivered to any purchaser, or his or her solicitor,) *to annul and put an end to his or her contract for sale.*" The abstract was delivered, and returned in due time with observations and queries. The contract was not thereupon rescinded by the vendor, but answers to the queries were returned. Upon these answers observations were made; and it was with reference to these last observations that the vendor claimed the right of annulling the contract, and gave notice to the purchaser accordingly. The purchaser's chief objection to the title was apparent on the face of the abstract as originally delivered, and consisted of a point of law which, at the hearing of the cause at the Rolls, Lord Langdale M. R. decided against him. His Lordship likewise, under the circumstances of the case, held the right of rescission well exercised; but added, that he should have thought

<sup>1</sup> 4 Beav. 269.

the notice to annul the contract invalid, if, in giving it, the vendor had sought improperly to escape from a duty, which by the nature of the contract he was bound to perform.

As in *Page v. Adam* the vendor did not rescind the contract upon the first return of the abstract, but entered into correspondence with the purchaser for the purpose of removing his objection to the title, there seems at first sight to be a variance between the judgment of the Master of the Rolls and that of the Vice Chancellor of England in *Tanner v. Smith*. Upon this point the Vice Chancellor Wigram made the following observations:—“The Vice Chancellor of England held that a treaty and correspondence between the vendor and purchaser, after the first objection taken, *with a view to complete* the title, was a waiver of the condition. It was not meant in *Page v. Adam* to decide that the vendor could take the benefit of the condition after he had waived it: and the case rather points to the conclusion, that Lord Langdale did not consider the treaty and correspondence as necessarily a waiver; and his observations about the good faith of the proceeding on the part of the vendor point the same way.”<sup>1</sup> In accordance with these remarks of the Vice Chancellor Wigram, it should be stated that in *Page v. Adam* the correspondence entered into by the vendor was not *with a view to complete the title*, or to make any additions to the abstract, but for the purpose of insisting on the sufficiency of the title as deduced by the original abstract: and under these circumstances there is a clear distinction between that case and *Tanner v. Smith*. “The vendor,” says Vice Chancellor Wigram, in *Morley v. Cook*, “cannot be bound to do more than *bond fide* deliver such abstract of title as he has at the time of delivering it, if the effect of doing more towards the completion of the title, in answer to the purchaser’s requisition, is to have the effect of a waiver of any condition of sale.”

(3.) But the vendor’s exercise of the right of rescission under such conditions of sale is not conclusive against the purchaser, upon the vendor’s simple declaration of his inability to remove the purchaser’s objections: and, if needful, the Court will, at the purchaser’s instance, direct an inquiry as

<sup>1</sup> 2 Hare, 110.

to the vendor's capability of showing a good title. In *Roberts v. Wyatt*<sup>1</sup>, an abstract had been sent to the purchaser, who, after taking an opinion thereon, had returned it with the objections to the vendor's solicitor. The latter stated that he was unable to clear up the objections of the purchaser's counsel, and refused to deliver up the abstract, though the purchaser offered to take such title as the defendant could make. Upon this the purchaser brought trover for the abstract against the vendor's solicitor: and one of the objections to the action was, that the contract was at an end under a proviso, "that in case the vendor could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase-money on the appointed day, the agreement should be utterly void." Sir James Mansfield C. J. there observed, "The defendant still says, I cannot answer this objection of Mr. Humphreys, and the whole transaction is at an end; but that is not so; if the plaintiff had said the thing is over, the matter might be rescinded. But what says the defendant? 'I cannot answer the objections.' In equity such an answer will not suffice; otherwise a seller, who had altered his mind, might very easily get rid of a contract; but the Courts of Equity say he shall answer on oath, first, in his answer to a bill filed against him, then on examination before a Master, whether a title cannot be made. The Courts often make a way to obviate apparent difficulties, and compel the seller to procure conveyances in order to complete his title: and the defendant's declaration, that he rescinds the contract, will not at all defeat the purchaser's right." And Lawrence J. concurred, saying, "I am of the same opinion, upon the construction of the proviso: it would be a monstrous construction, if either party could vitiate the agreement by refusing to perform his part of it."

Lord Langdale's remarks at the conclusion of his judgment in *Page v. Adam* appear also to coincide with the doctrine of the Court of Common Pleas in *Roberts v. Wyatt*: and in any other view of the relative rights of the parties, it is obvious that a vendor wishing to escape from his own contract would be clothed with a power which he might

<sup>1</sup> 2 Taunt. 268.



exercise in a most unconscientious manner. The vendor's rescissory power under special conditions of sale is, therefore, in no wise an arbitrary or unimpeachable right; and consequently it cannot be safely put in force, except in concurrence with the means of proving the vendor's entire *bonâ fides* in the proceeding.

(4.) Neither will a vendor be allowed, by the delivery of a designedly imperfect abstract in the first instance, to secure to himself the opportunity of rescinding the contract.

This point arose in *Morley v. Cook*, and the Vice Chancellor Wigram made the following remarks upon it:—“Undoubtedly a Court of Equity would not permit a vendor, who had a good title and the means of showing such title on his abstract, fraudulently to deliver an imperfect abstract, to which objections would necessarily be taken: and upon these objections being taken, avail himself of his own fraud to avoid his contract under the condition. I agree,” continued His Honor, “that a vendor, in a case like the present, is bound to deliver the best abstract that he can; and a Court of Equity would not do a very violent act in holding, that a vendor who, under conditions of this kind, having a perfect abstract, fraudulently delivered one which was imperfect, had, by such fraudulent breach of the conditions on his part, forfeited the benefit of the conditions in his favour.” The point did not call for direct decision; but there can be little doubt that His Honor laid down the law with his usual accuracy.

(5.) In order, also, to prevent a vendor from forcing an imperfect title upon a purchaser, it has been ruled that the time limited by the conditions of sale for the statement of the purchaser's objections to the title shall not begin to run until the delivery of a perfect abstract; and consequently that the vendor's right of rescission shall be in like manner deferred.

Thus in *Hobson v. Bell*<sup>1</sup>, where the subject of contract was a reversionary interest in stock, which was sold by a mortgagee under a power of sale, the 4th condition of sale was as follows:—“The vendor shall deliver an abstract of

<sup>1</sup> 2 Beav. 17.

title to the purchaser or his solicitor within two days of the day of the sale to the stock in question, and all and every objection to the title shall be made and communicated in writing to the vendor's solicitor within twenty-one days after the delivery of the abstract; and if the same be found valid, the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit money; but all and every objection to the title not so taken and communicated within such period of twenty-one days from the delivery of the abstract aforesaid shall be deemed waived, and in this respect time shall be considered the essence of the contract." The abstract omitted several material parts of the will by which the reversionary interest was created, and was further defective in not giving any evidence of the identity of the stock, or of its liability to the trusts of the will, or of the default by virtue of which the mortgagee's power of sale became exercisable. Lord Langdale M. R. was clearly of opinion that the abstract was defective, and that it ought to have been originally delivered to the purchaser in a more perfect form: and his Lordship proceeded thus: — "To say that the time for making objections should run from the time of delivering that imperfect abstract, from which it could not be ascertained what objections there might be, appears to me extremely unreasonable. The objections could only be taken when a proper opportunity had been given for taking them, or when a perfect abstract had been furnished to the purchaser, and such an abstract has not yet been delivered. By the conditions all objections to the title are to be made within twenty-one days *from the delivery* of the abstract, that is, within twenty-one days from a time which has not yet arrived. The conditions also provide, that all objections not so taken within such period of twenty-one days from the delivery of the abstract shall be deemed waived, and that time shall be considered the essence of the contract, as to the waiver of objections not taken within that time. It appears to me, that upon the construction of these conditions, and having regard to the abstract delivered, time cannot be considered as having been made of the essence of the contract."

The same principle was recognised in *Blacklow v. Laws*<sup>1</sup>, in which case it appeared, that by the 8th condition of sale the purchaser was required within twenty-one days next after the delivery of the abstract to deliver to the vendor's solicitors a statement in writing of such objections to the title disclosed by the abstract as he should be advised to take; and that every objection not so taken and communicated within such period should be deemed waived. The sale took place under a decree of the Court of Chancery, and the abstract delivered to the purchaser did not contain any statement of the pleadings in the cause. Such objections as the abstract disclosed were delivered within the twenty-one days, together with a requisition by the purchaser's counsel for a brief of the pleadings. The brief was not supplied until, long after the expiration of the twenty-one days, and then the purchaser's counsel took an objection that the decree was irregular. The vendors insisted that the objection came too late, as it arose from the inspection of a document which had been called for within the twenty-one days. But Vice Chancellor Wigram held the contrary, and decided that the twenty-one days allowed for objecting to the title were not to be computed from the time of the delivery of an imperfect abstract, and that the purchaser was not precluded from taking an objection which arose out of evidence called for before the expiration of the time fixed.

It becomes, therefore, a point of importance to determine what constitutes a perfect abstract within the purview of the cases of *Hobson v. Bell* and *Blacklow v. Laws*.

In *Morley v. Cook*<sup>2</sup> it was contended in argument by the purchaser, that a perfect abstract had not been delivered, and therefore, that the time for delivering objections had not expired. In reference to this argument, the Vice Chancellor Wigram said, "If by the expression 'perfect abstract' is meant the most perfect abstract in the vendor's possession actual or constructive at the time of his delivering it, I should probably accede to the plaintiff's argument. . . . In any other sense of the words 'perfect abstract,' I should have difficulty in following the argument. A perfect abstract, in the strict

<sup>1</sup> 2 Hare, 40.

<sup>2</sup> Ibid. 106. See p. 111.

sense of the term, would show a good title ; but the conditions clearly mean to provide for the case of an abstract not showing a good title." In *Hobson v. Bell*, Lord Langdale must have considered that the vendor's omission to exhibit in the abstract those special particulars and circumstances which constituted his own title as originally derived from the mortgagor, and his existing right as a mortgagee to exercise a power of sale, was a clear breach or neglect of duty on the vendor's part : as such facts must have been known to the vendor, and were palpably such as a purchaser would insist upon knowing.

It may therefore, we think, be inferred, that a perfect abstract is the best that the vendor has it in his own power by proper skill and diligence to present to the purchaser at the appointed time : and the Vice Chancellor Wigram's observations in *Morley v. Cook* seem to show that if the vendor's honesty or diligence regarding the contents of the abstract be impeached, the Court will take upon itself to enquire whether the vendor could not in the first instance have furnished a better, or rather a less imperfect abstract of his title ; not whether he had the means of procuring a better title than that under which he actually holds the property at the time of the delivery of the abstract, but whether the abstract originally delivered has accurately set forth his actual present title, and all such particulars regarding it, as he is in legal intendment presumed to know, and from the exhibition of which he has not protected himself by means of the restrictive conditions (if any) accompanying the sale.

It appears to be undecided in what manner the Court would deal with the vendor's rescissory power, where a vendor acting *bonâ fide* should deliver a second abstract (properly so called) after objections taken to a first abstract.<sup>1</sup> But such a point may easily be provided for by the conditions of sale, so as to obviate the necessity of applying to a Court of Law or Equity for its decision.

(6.) The rescissory power of a vendor being designed for his own protection against possible difficulties and expenses, it cannot, we apprehend, be exercised or enforced against

<sup>1</sup> 2 Hare, 114.

a purchaser who may be willing to take the title notwithstanding its defects and his own objections to it. But as doubts may arise whether such a clause absolutely vacates the contract, or leaves the purchaser at liberty to accept the title, the point ought to be rendered certain by express words in the conditions of sale.<sup>1</sup> It is clear, however, that a vendor cannot by wilful neglect to satisfy a requisition release himself from the contract.<sup>2</sup>

2. *Conditions compensatory.* By this class of conditions it is usually stipulated, that where any error is discovered in the description or quantity of the estate, or in the vendor's interest therein, the contract shall not be vacated or avoided, but the purchaser shall accept a compensation, or be allowed an abatement in his purchase money.

Courts of Equity acting on general principles enforce the partial performance of contracts, even in the absence of special conditions of this nature, in cases where the subject of sale can be *substantially* conveyed to the purchaser: and the general doctrines on this subject will be found discussed at large in Sir Edward Sugden's treatise on Vendors and Purchasers. But the principle of compensation is one of exceedingly difficult application, as will be seen by the various decisions relating to it. "There is no standard," says Sir Thomas Plumer M.R., "by which to ascertain what is essential to a purchaser. The motives for purchasing real property are very different in different persons. Tastes, opinions, ages, create different views. Some particularity, some whim may have induced him to purchase. What is desirable to one is not so to another. One wants a wood for game, another desires it only as a beautiful object; one looks only to agriculture, another dislikes tithes. It therefore seems a little arbitrary to insist on a party taking compensation."<sup>3</sup> But where the contract of sale itself introduces the principle of compensation, its application, if practicable, becomes unavoidable: and in regard to the language of conditions of sale one or two points are deserving of notice, as being not

<sup>1</sup> Williams v. Edwards, 2 Sim. 78. See Rede v. Farr, 6 M. & S. 121.

<sup>2</sup> Taylor v. Brown, 2 Beav. 181. Page v. Adam, 4 Beav. 269.

<sup>3</sup> 1 Madd. 167.

always within the contemplation of the persons by whom such conditions are usually framed.

(1.) In order to admit the principle of compensation, the errors contained in the particulars of sale must not be intentional.

This was decided by Lord Ellenborough C. J. in the case of the Duke of Norfolk v. Worthy<sup>1</sup>, where the estate was described in the particulars as *about* one mile from Horsham. It turned out that the estate was between three and four miles from that place. Upon an action brought by the purchaser for recovery of the deposit, it was insisted that the effect of the misdescription was saved by the condition, which provided that no error or misstatement should vitiate the sale. But Lord Ellenborough said that, in cases of this sort, he should always require an ample and substantial performance of the particulars of sale, unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This, he conceived, was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled. His Lordship, therefore, left it to the jury, whether this was merely an erroneous statement, or the misdescription was wilfully introduced to make the land appear more valuable from being in the neighbourhood of a borough town. In the former case, the contract remained in force; but, in the latter case, the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict, so that the jury, says Sir Edward Sugden, must have thought the misdescription fraudulent. Lord Tenterden, in a subsequent case, expressed his opinion, that where the misrepresentation was of the essence of the subject of sale, it is immaterial whether the variance be wilful or not.<sup>2</sup>

(2.) Misdescriptions in constituting the essence of the subject of sale will vitiate the contract, and exclude the principle of compensation.

<sup>1</sup> 2 Campb. 337. Abridged in Sugd. V. & P.

<sup>2</sup> Sherwood v. Robins, 1 Mood. & Malk. 194.

In *Flight v. Booth*<sup>1</sup> the Lord Chief Justice Tindal thus adverted to the state of the law relative to compensation for misdescriptions: — “It is extremely difficult to lay down from the decided cases any certain definite rule, which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be a ground of compensation only. All the cases concur in this, that, where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases: some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only: *Duke of Norfolk v. Worthy*<sup>2</sup>; *Wright v. Wilson*<sup>3</sup>; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale: *Jones v. Edney*<sup>4</sup>; *Waring v. Hoggart*<sup>5</sup>; *Stewart v. Alliston*.<sup>6</sup> In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract, that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of sale.”

(3.) Where a misdescription is not, from the nature of it, capable of pecuniary estimation, the principle of compensation cannot operate, and the contract will fail.

The case of the *Duke of Norfolk v. Worthy*<sup>2</sup>, already cited, is an example of this rule with respect to the *quality* of an estate, — the difference in value between a distance of one

<sup>1</sup> 1 Scott, 190; 1 Scott's N. C. 370.

<sup>2</sup> 1 M. & Rob. 207.

<sup>3</sup> Ry. & Mo. 40.

<sup>4</sup> 1 Campb. 337.

<sup>5</sup> 3 Campb. 285.

<sup>6</sup> 1 Mer. 27.

mile, and another of four miles from a borough-town, being wholly incapable of estimation.

In *Sherwood v. Robins*<sup>1</sup> also, where there was a stipulation for compensation to the purchaser, in case of misdescription, the principle was found inapplicable. The plaintiff brought his action to recover from an auctioneer the deposit paid on a purchase at an auction of property described as "the reversion of 2000*l.* after the death of a person aged 66," subject to a contingency defeating the reversion in case the party on whose death the reversion was expectant should leave children. It was proved that the party in question was only of the age of 64, and not of 66; and the jury having found that this misrepresentation was wilful, the plaintiff obtained a verdict. Lord Tenterden C. J. then said that he thought the wilfulness of the misrepresentation immaterial; and proceeded thus:—"In the case of a reversion, simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition; for the difference of value may be computed: but where there is an additional contingency, such as that of the birth of future children, in this case, the difference of age alters the likelihood of that contingency; and in such a case, therefore, no estimate can possibly be made of the difference of value between the thing described and the thing sold, and the contract itself must be vacated."

In *Flight v. Booth*<sup>2</sup> the particulars of sale described a house in the Piazza of Covent Garden as calculated for an extensive business in the carpet, haberdashery, drapery, paper, floorcloth, upholstery, *grocery, tea-trade, &c.*; and stated that there was a clause in the lease prohibiting any *offensive* trades to be carried on upon the premises—and that "they cannot be let to a coffee-house-keeper or working hatter." On the production of the lease it was found that the prohibition extended to the trades of a "brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheesemonger, fruiterer, herb-seller, coffee-house-keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter," or suffering the premises to be used as a

<sup>1</sup> 1 Mood. & Malk. 194.

<sup>2</sup> 1 Scott, 190; 1 Scott's N. C. 370.



shop or place for the sale of coals, potatoes, or any provisions whatsoever." There was also a clause prohibiting assignment of the premises during the last seven years of the term, without the consent, in writing, of the superior landlord. Upon these facts, the Court of Common Pleas held that the misdescription was so material, and the difference of value so uncertain and arbitrary, that recourse could not be had to the compensation clause, and consequently that the purchaser was entitled to rescind the contract and recover back his deposit.

In *Dykes v. Blake*<sup>1</sup>, the thirteenth lot was described in the particulars as "a first-rate building plot of freehold ground," having a frontage of eighty-six feet to the grove and ninety feet to the carriage sweep." The existence, however, of a right of way across the ground was suppressed; and the Court of Common Pleas held that the principle of compensation did not apply. "The purchaser," the Court said, "might fairly conclude, as the seller intended him to conclude, that he might purchase the whole lot for the purpose of building. But the direction of the way claimed would render the close altogether useless for the very purpose for which it was known to be purchased."

In *White v. Cuddon*<sup>2</sup> certain manors were described as manors in which the fines were arbitrary, while the annual amount of such fines was *underrated*. It appeared that the fines were arbitrary only on alienation; and the House of Lords held that the purchaser could not enforce specific performance with compensation, because there were no precise data by which the amount of it could be ascertained, for arbitrary fines are necessarily incapable of valuation.

A partial defect in the title to the estate is also not a subject of compensation. Thus in *Wheatley v. Slade*<sup>3</sup>, where a vendor entitled to nine-sixteenths of the fee-simple agreed to sell the entirety, the Vice Chancellor of England refused to decree a specific performance with an abatement of the purchase money.

So also in *Roffey v. Smallcross*<sup>4</sup>, where under a decree a

<sup>1</sup> 6 Scott, 320.

<sup>2</sup> 8 Cl. & Fin. 766.

<sup>3</sup> 4 Sim. 126. See also *Dalby v. Pullen*, 3 Sim. 29.

<sup>4</sup> 4 Madd. 227.

person purchased two-sevenths of an estate in one lot, and a good title was made to only one-seventh, the purchaser was allowed to rescind the contract as to the whole of the lot.

Again, the difference between a freehold and a copyhold estate is incapable of estimation; and a purchaser cannot be compelled to accept a copyhold estate in lieu of a freehold<sup>1</sup>: though a vendor will perhaps be allowed time to procure an enfranchisement.

(4.) Where conditions of sale extend, as they sometimes do, to provide compensation, not only for the vendor, but also for the purchaser, in case of misdescription or error, the effect of such conditions is particularly oppressive on the purchaser, as he may thus be rendered liable to the payment of a sum of money far beyond the limit of his own resources.

We are not aware of any case of this kind having come before the Courts for decision upon the vendor's claim for compensation. But as an error in the particulars of sale necessarily originates with the vendor, we apprehend that he would have great difficulty in substantiating a claim of this nature in any case where the means of obtaining accuracy were within his command previously to the sale. In *Tomkins v. White*<sup>2</sup>, Lord Ellenborough said, "A little more fairness on the part of auctioneers in the framing of their particulars would avoid all these inconveniences. There is always a suppression of a fair description of the premises, or there is something stated which does not belong to them: and in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected of them. The particulars are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates."

III. Conditions *Posterior*. — Conditions of this class usually make provision for satisfaction to the vendor in case of the purchaser's non-fulfilment of his contract. It is generally stipulated that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to resell the

<sup>1</sup> *Twining v. Morrice*, 3 Bro. C. C. 326. 331.

<sup>2</sup> 9 Smith, 439.

estate; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter;" and Sir Edward Sugden advises that this condition should never be omitted. It forms a lien on the estate for the purchase money, &c., and if the purchaser do not comply with the conditions, the vendor may, by virtue of this stipulation, resell the estate, and recover the deficiency and charges from the purchaser. And if the money produced by the second sale exceed the original purchase money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.<sup>1</sup> Conditions posterior sometimes, however, go on to provide for stipulated damages to be mutually payable by either party making default in fulfilling the contract. But the construction of such a clause in the conditions seems to be attended with some doubt. In *Reilly v. Jones*<sup>2</sup>, on the sale of the lease of a public-house there was a condition that law expenses, &c. should be paid by the parties in equal moieties, and that, either of them not fulfilling all and every part of the agreement, the party not fulfilling should pay unto the other the sum of 500*l.*, "settled and fixed as liquidated damages;" and it was held by the Court of Common Pleas that the sum thus fixed was not a mere penalty to cover the actual damage, but was itself the measure of damages to be recovered on any breach of the agreement. In *Randal v. Everest*<sup>3</sup>, however, Lord Tenterden took a different view of such a condition. The agreement in that case contained the following clause; "If either of the parties shall neglect or refuse to comply with his part of the agreement, the party so refusing or neglecting shall pay to the other of them, on demand, the sum of 100*l.*, hereby mutually agreed upon to be the damages ascertained and fixed on breach thereof." And his Lordship in summing up, said: "A great deal has been said about the different import of the terms *penalty* and *stipulated damages*; but I am of opinion, and shall always hold so until compelled by a higher authority to say otherwise, that whether the term *penalty* or *liquidated damages* be used in the agreement, a party who claims com-

<sup>1</sup> Sug. V. & P. 34., 7th edit.

<sup>2</sup> 1 Bing. 302.

<sup>3</sup> 1 Mood. & Malk. 41.

pensation for a default shall only be allowed to recover what damage he has really sustained. Whatever language the parties may choose to use, I am of opinion, in point of law, that a jury cannot be called upon to give more damage than the party has really sustained. I confine my opinion to contracts not under seal; instruments in that form may perhaps receive a different construction." The subject was again discussed in *Crisdee v. Bolton*<sup>1</sup>, before the Court of Common Pleas, when Best C. J. said he could not subscribe to the doctrine of Lord Tenterden in *Randal v. Everest*. Sir Edward Sugden has noticed this diversity of judicial opinion; and remarks that whichever may be the correct opinion, a jury may, without proof of damage, give the whole sum named in the conditions. His observation applies also to a stipulation that the deposit shall be forfeited and belong to the seller as stipulated damages: and he adds, that, where the expenses of the resale, &c. are stipulated for, the measure of damages would be those expenses, &c.<sup>2</sup>

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## ART. VII.—MEMOIR OF THE LATE CHARLES BUTLER, ESQ.

THE biography of Mr. Butler would, we think, be a pleasant and profitable task. A life of 82 years, distinguished by complete success in the most learned branch of the law, constant labours in the cause of civil and religious liberty, frequent intercourse with great and learned men, and literary pursuits extending over the wide field of history, geography, ecclesiastical and biblical learning, and mathematics, is a subject which would provide ample materials for the writer, and, if properly treated, could not fail to interest and instruct the reader.

It is not, however, our intention in the following pages to give a *Life* of Mr. Butler, or attempt fully to delineate his

<sup>1</sup> 3 Carr. & P. 240, 243.

<sup>2</sup> 1 V. & P. 66. 10th ed.

*character.* For the first, we have neither time nor space, and to the second we confess ourselves unequal. Were indeed time and space at our command, we would gladly submit to the profession and the public details which, we think, would be acceptable to both; and leaving the second duty of the biographer, at least in part, unperformed, ask each reader, according to his own stock of learning, to pronounce the just estimate of Mr. Butler's literary attainments. It would, we think, be no small balance in which they could be fairly weighed. The limits of our present task will be, to present to our readers a sketch of the chief events of Mr. Butler's life, and a short account of his various publications; reserving for the last place the consideration of his legal acquirements and writings, and the services rendered by him to the science of the law.

Mr. Butler was born on the 14th of August 1750, and was descended from the ancient Catholic family of "Butler" of Aston Le Walls and Appletree, in the county of Northampton. Towards the commencement of the 17th century the larger estate at Aston Le Walls passed, by the marriage of an only daughter and heiress, into the family of "Plowden," of Plowden, in Shropshire, whilst the remaining estate of Appletree devolved upon the younger branch of the Butler family. Simon Butler, the representative of this branch, at the close of the 17th century was employed by the first Duke of Devonshire in negotiating with the Prince of Orange, afterwards William III., and a family tradition records, that he subsequently regretted the part he then took. However this may be, his fortunes were not improved by the great event which followed, and upon his decease, which took place in 1712, his estates were sold. He left three sons, Charles, Alban, and James. Charles died at an advanced age without issue. Alban took orders in the Church of Rome, and filled the office of President of the English college of St. Omer for several years, and died in the year 1773. He is well known by his learned and pious work, "*The Lives of the Saints.*" James settled in London, and married a lady of French extraction of the name of Granom, whose family was honourable, and had long been settled at Ambleteuse. The issue of their marriage was one child, the subject of this memoir.

From his mother, who was a woman of great accomplishments, perfectly versed in the French and Latin languages, and not unacquainted with the Greek, Mr. Butler acquired at an early age a love for literature which never forsook him, and which afforded him a constant source of relaxation during his long and laborious life. In his 6th year, he was sent to a preparatory school near London, and three years afterwards was removed to a seminary at Esquerchin, a small village in the neighbourhood of Douai, dependent on the English college at that place, and, after remaining there three years, he was removed to the college itself. During his stay at Douai, he formed a design of embracing the ecclesiastical state, but which he abandoned in consequence of the opposition of his family. Towards the end of the year 1776, Mr. Butler returned to England. His chief acquirements at this time appear to have been, a sound knowledge of the French, Latin, and Greek languages, and a general acquaintance with the great writers of antiquity. To these may be added, a slight knowledge of music, which he afterwards improved. For metaphysics (a study then perhaps more in vogue than at present) Mr. Butler never had any taste, and he did not commence the study of mathematics till an advanced period of his life, a circumstance he often lamented. The two following years after his return to England he spent chiefly in the perusal of the English poets, modern history, and French literature. In the latter he always took great pleasure.

In 1769 Mr. Butler determined upon the study of the law. The branch to which he devoted himself, less by choice than necessity, was that of conveyancing. His religion precluded him from the Bar, which was not open to Roman Catholics till the year 1791, when Mr. Butler was called to the Bar, and was the first Catholic who received that rank since the Act of 7 & 8 William III. Mr. Butler first placed himself under Mr. Maire, and subsequently under Mr. Duane, both Roman Catholic conveyancers of considerable eminence.<sup>1</sup>

<sup>1</sup> The English Catholics owe a great debt of gratitude to those members of their communion, who by their honourable pre-eminence in the only branch of the law which remained open to them, afforded during nearly two centuries a living proof of the impolicy and injustice of the laws which excluded the members of their religion from every other branch of that science, and from every public employment in the realm. See 1 L. R., p. 396. — Ed.

The following sketch, by Mr. Butler, of the science, the study of which he thus commenced, and of the most distinguished of those who preceded him in its practice, will, we think, be acceptable to our readers, especially as we believe it has not hitherto appeared in print. "Conveyancing became a distinct branch of the law during the time of the Usurpation, when it was first practised as such by Sir Orlando Bridgman. It then fell principally among the sergeants of the Court of Common Pleas. Sir Edward Northey appears to have been frequently consulted on conveyancing points. The first regular conveyancer was Mr. Pigot.<sup>1</sup> He was a most profound lawyer: his treatise on Recoveries is excellent: he discovers in it a deep and extensive knowledge of real actions, and the Statute of Uses. The first Mr. Webb was the most eminent of Mr. Pigot's contemporaries. On Mr. Pigot's decease Mr. Booth came into repute: he was an able lawyer, but greatly inferior to Mr. Pigot. His principal merit was framing deeds: the plan of them was good, the language accurate; their only fault was length. Mr. Filmer was his contemporary, and his superior. After him came Mr. Halliday, Mr. Phipps, and Mr. Banks. After them, but infinitely their superior, was Mr. Fearne. His Essay on Contingent Remainders has never been surpassed. In settling deeds he sometimes shewed great ingenuity, great depth of learning, and great power of language, but of that branch of the profession he was not master: the deeds which he prepared himself were miserably defective. Mr. Hargrave was greatly superior to him in the general learning of the law, and at least his equal in the branch of it to which Mr. Fearne particularly applied himself."

In 1775, Mr. Butler commenced practice as a conveyancer under the bar. Business came to him almost immediately, and continued to increase until the year 1825, when, in his 75th year, his eye-sight, and perhaps his spirits, began to fail him. During the last half of the period we have just mentioned he was, probably without exception, the first conveyancer of the day. His professional income, we are

<sup>1</sup> We have already stated our reasons for differing with this opinion. See 1 L. R., p. 396. — Ed.

informed, exceeded, in some years, 6000*l.*, in many 5000*l.*, in most 3000*l.*, exclusive of the fees which he received from his numerous pupils. Success such as this is, we submit, conclusive evidence of great talent, learning, and industry. Mr. Butler has, however, left certain records of the eminent degree in which he possessed those qualities in his legal writings. To these we shall have occasion to refer more particularly hereafter.

In the year 1778, Mr. Butler first became known to the public as an author, by a pamphlet intitled "An Essay on the Legality of Impressing Seamen."<sup>1</sup> It was written at the request of Lord Sandwich, then First Lord of the Admiralty, who subsequently availed himself of Mr. Butler's services in his defence to the charges made against his administration of Greenwich Hospital, which, it will be remembered, brought Lord Erskine into notice and eminence. In both instances Mr. Butler performed his task successfully, and thus gained the friendship of Lord Sandwich, in whose house Mr. Butler found full scope for his literary and musical tastes.

The next publication of Mr. Butler was the continuation and conclusion of Mr. Hargrave's edition of Coke upon Littleton. Twelve years had been devoted by his learned predecessor to this task, who had scarcely completed one half, when it was transferred to Mr. Butler, upon the hard condition of completing it within the four succeeding law terms, which, by immense exertion, he accomplished. We shall have occasion hereafter to consider the fruits of his labour, confining ourselves for the present to the remark, that six editions—the first published in the year 1787, and the last in 1832, a few weeks previous to Mr. Butler's death—have proved the estimation in which they were held by the profession.

Almost contemporaneously with undertaking his great legal work, Mr. Butler entered upon another labour, which

<sup>1</sup> Mr. Butler had previously published a pamphlet on a subject of merely local interest, namely, an Essay on Houses of Industry in Norfolk. The subject of it, says Mr. Butler, was one of the many well-meant, but unavailing attempts which were made during the last century to ameliorate the condition of the poor. It was written at the request of Sir Harbord Harbord, afterwards Lord Suffield, and Mr., afterwards Sir George Chad. — *Reminiscences*, i. p. 66.



extended over nearly fifty years of his life, which oftentimes appeared hopeless, but which he nevertheless had the good fortune to see crowned with success. We refer to the long and arduous struggle for Catholic emancipation. In the year 1786, Mr. Butler was elected secretary of the Roman Catholic committee of noblemen and gentlemen, whose object was the emancipation of themselves and their fellow religionists from the civil disabilities which the intolerance of ages had heaped upon them. The energy, and almost self-devotion of Mr. Butler in accepting this office, and in the subsequent discharge of its duties, during many years, was very great. He was ardently attached to his profession; he had a large and increasing practice; he had great tastes for literature, and other intellectual amusements, and much enjoyment in society; and yet he fearlessly undertook a task, the limits of which none could have foreseen, which made almost daily demands on the time he knew so well to employ, and which constantly exposed him to the most harassing annoyances and anxieties.

The labours of Mr. Butler at this time required—what he undoubtedly possessed—an excellent constitution. He rose at four o'clock in the morning, and was awakened by the ring of his hairdresser, to whom he always opened the street door. Until ten o'clock he devoted himself to his great legal work, and at that hour he proceeded to Lincoln's Inn. At five o'clock he came home for a hasty dinner, and afterwards again proceeded to chambers, whence he returned about ten o'clock, and, after a light supper, retired to rest, unless a literary or musical society tempted him to break in upon his hours of repose.

In 1790 Mr. Butler submitted to the public the first part of his *Horæ Biblicæ*, being an "Historical and Literal Account of the original Text, Versions, and printed Editions of the Old and New Testament, or the Sacred Books of the Jews and the Christians;" which was shortly followed by the second part, containing a similar "Account of the Works accounted Sacred by the Mahometans, the Parsees, Hindoos, Chinese, and Scandinavians;" to which was added, a dissertation on the supposed council of Jews held at Ageda in Germany, in 1650, and an account of the contro-

versy respecting the verse 1 John 5. v. 7., commonly called the "verse of the three witnesses." From these it will be seen, that the early taste which Mr. Butler showed for ecclesiastical and scriptural learning did not desert him in his after life; and it cannot be doubted that the desire which he had early felt to devote himself entirely to those pursuits sometimes recurred to him.

The next literary work was a small publication intitled "*Horæ Juridicæ*." It consisted of a series of notes respecting the codes and original documents of the Grecian, Roman, Feudal, and Canon Laws, originally compiled by Mr. Butler for his own use, and which he afterwards thought might prove (as we believe they have done) interesting and useful to the profession and the public. The portion of this work which related to the Feudal Law formed the ground-work of the long annotation on feuds to Coke upon Littleton, which was added to the third edition by Mr. Butler. The first edition of the "*Horæ Juridicæ*" was published in the year 1804; it subsequently went through several editions.

Mr. Butler's second legal work, his edition of Fearne's Essay on Contingent Remainders, was published in the year 1809. The consideration of this work we reserve for a future page. Its reception by the profession was scarcely less successful than that of Mr. Butler's edition of Coke upon Littleton, and it subsequently went through three editions, the last published in 1831.

In 1812, Mr. Butler published a "*History of the Geographical and Political Revolutions of the Empire of Germany*." This work was written by him in the same manner as the "*Horæ Juridicæ*" and "*Horæ Biblicæ*," which preceded it, and which we have already noticed. Shortly afterwards followed "*An Historical and Literary Account of the Confessions of Faith of the Roman Catholic, Greek, and principal Protestant Churches*," in one vol., "*Historical Memoirs of the Church of France*," in one vol., and "*Biographical Account of Bossuet, Fénelon, the Abbot de Rance, Thomas à Kempis, St. Vincent de Paul, and De Boudon*," in one vol. Here Mr. Butler's early predilection for ecclesiastical learning again appears: but, besides this, several particular causes influenced his selection of the subjects treated in the three last-mentioned works.

In the endeavours for Catholic Emancipation, long and bitter were the disputes as to the nature of the Papal power, and many other doctrines of the Catholic Church, and it became of the utmost importance that the precise nature of the disputed doctrines should be known. They were to be discovered in the general confessions of faith which that Church imposed upon its children; they were to be illustrated by comparison with those of other Churches; and the most valuable information on the subject was to be procured from the History of the French Church, in which the Papal power and many other of the disputed doctrines had been minutely considered; and upon the latter subject Mr. Butler was possessed of much valuable information, which he had derived from the learned and pious emigré clergy, to whom his house was always open. Under these circumstances, Mr. Butler wrote the two first of the three works we have just mentioned. The History of the Church of France naturally led to the Lives of its two greatest ornaments, which formed the bulk of the third, the other biographies being very concise accounts, which Mr. Butler had compiled at different times, and took this opportunity of publishing.

In the year 1815, Mr. Butler had the honour of delivering the Inaugural Oration upon laying the first stone of the London Institution for the Diffusion of Science and Literature. Its general purport was the advantage which science and commerce derived from each other; and in support of his views, Mr. Butler employed many and varied historic illustrations. The address was well received, and printed at the expence of the Institution. In the year 1818, Mr. Butler published the principal, and with the exception of the 1st volume of his *Reminiscences* (a work we shall notice in due course), the most successful of all his literary works. It consisted of the “*Historical Memoirs of the English, Irish, and Scottish Catholics*,” it first appeared in two volumes, embracing the period subsequent to the Reformation, and containing the best information concerning the external and internal occurrences during that period, in which the British Catholics were particularly interested. The first edition had a rapid sale; a second immediately followed, and in 1822, Mr. Butler published a third and more valuable edition, con-

taining a preliminary account of the principal occurrences in the English Church before the Reformation, a fuller account of the subsequent events, and a short notice of the most remarkable revolutions in the histories of the Established Church and the Dissenting congregations. In May, 1820, Mr. Butler attended on the last moments of Henry Grattan, and received that great man's dying aspiration for the religious freedom of his country: an interesting account of this interview will be found at p. 194. of the 1st vol. of Mr. Butler's *Reminiscences*. The last-mentioned work was published in the year 1822. It contains much valuable information and interesting anecdote, and gives a short account of the various publications we have already noticed. A note respecting the authorship of Junius, a learned correspondence with Dr. Parr, a solution of a mathematical problem of Professor Porson, and a letter on music, were inserted in the Appendix. It went through four editions, the last published in 1824, when Mr. Butler designed to have finished his literary career, as, at the advanced age of 74 years, was but natural. The cause in which he had accepted so early a retainer was however still at issue, and a powerful advocate had just been added to the opposite side. Dr. Southey, whose earlier writings had bespoken, to say the least, no intolerance, published his celebrated "*Book of the Church*," in which he brought the heaviest accusation and employed the strongest invectives against the Catholic religion. The extensive learning and great ability of the work Mr. Butler fully recognised, but he resented what, in common with all of his religion, he deemed its extreme injustice and violent abuse, and, a few weeks after its publication, he produced "*The Book of the Roman Catholic Church*," which his friends considered to be a conclusive, and which every one must admit was a candid and able reply. Two editions of it were published, and met with a ready sale. Ten champions, amongst whom the more distinguished were the present Bishop of Exeter, and the Reverend George Townsend, rushed forward to defend the post, the honour or the difficulty of maintaining which they deemed too great for Dr. Southey alone. Mr. Butler, no doubt fearing that a reply to each individually might again

raise up fresh combatants in more than hydra proportion<sup>1</sup>, concentrated his defence in a series of Letters to the Reverend George Townsend, whom he considered to have made the strongest objections to his work, and a Letter to Charles Blundell, Esquire, containing a reply to such other of the objections of his adversaries as seemed to call for particular notice. To this vindication several replies were published, and Dr. Southey again appeared in the field with a publication intitled "*Vindiciæ Ecclesiæ Anglicanæ.*" Adhering to his original plan, Mr. Butler replied again to his antagonists by a second Letter to Mr. Blundell. The whole of Mr. Butler's publications in this controversy, subsequent to the Book of the Roman Catholic Church, were in 1826, published together in one volume, intitled, "*Vindication of the Book of the Roman Catholic Church.*" With respect to the merits of this controversy, differences of opinion will exist, and it would be foreign to the objects of our publication to offer any; but a perusal of it cannot fail, we think, to establish Mr. Butler's character as a Christian scholar and gentleman.

In the years 1825 and 1826, Mr. Butler published his biographical accounts of Erasmus and Grotius, and in 1827, he published a supplemental volume of his *Reminiscences*.

About this time, Mr. Butler gave much consideration to the amendment of the law, particularly with respect to the transfer of property, a subject upon which he was consulted by the present Lord Chancellor whilst Master of the Rolls, and after he received the Seals. Of the views entertained by Mr. Butler on this point we shall have occasion to speak hereafter; contenting ourselves for the present with the following extract from his note-book (he always kept one), upon the perusal of Lord Brougham's splendid oration on the law, delivered in the House of Commons in the session of 1828. It will show the lively interest Mr. Butler took in the subject:—"Read with the greatest attention Mr. Brougham's speech on the state of the law: the delivery of it took six hours and a half. Admirable! The knowledge of the various subjects brought forward by him, the

<sup>1</sup> *Crescere per damnum, geminasque resumere vires.*

*Ovid. Metam. ix.*

method, the clearness, the happy illustration which it displays throughout, must be universally acknowledged : it must produce a great effect."

Mr. Butler's attention was soon called from his literary and legal pursuits by the great event of Catholic Emancipation, which had for some time cast its giant shadows in advance. The result of the Clare election at the end of the session of 1828 had at length brought matters to an issue. The consequences of a general election were obvious, and not to be lightly hazarded, even supposing that each Catholic member was in turn to be rejected at the bar of the House of Commons as he presented himself. Nor was this by any means certain : the argument in favour of a contrary conclusion, as has been correctly stated<sup>1</sup>, was not "that there was any doubt as to the legislative intention, but that the Popery laws were a formless mass of enactments, heaped upon vanquished adversaries by blind passion and brute force, without unison, consistency, or the guiding light of consecutive design." In accordance with this view, Mr. Butler published an elaborate argument and opinion, which at the time startled the public, and might have startled a severely scrupulous judge<sup>2</sup>.

The Emancipation Act passed on the 13th of April, 1829, and the point ceased to be of importance, although it was virtually decided in the negative by the House of Commons, requiring Mr. O'Connell to take the old oath, as it was called, in consequence of his having been elected before the passing of the Act. The result was, that the representation of Clare again became vacant, when Mr. O'Connell was re-elected without opposition. After the passing of the Emancipation Act, Mr. Butler published a short memoir of it, which formed the sequel, and triumphant conclusion, to his *Historical Memoirs of the British Catholics*. It was dedicated — a well deserved compliment — to the late Lord Holland, who had always been a strenuous supporter of the measure.

One more publication completes the catalogue of Mr. Butler's literary performances. He had many years before compiled, but had never printed, a life of Chancellor D'Agues-

<sup>1</sup> Lardner's Cabinet Library, Life and Reign of George the Fourth, vol. iii. p. 338.

<sup>2</sup> Ibid.

seau. This work with a reprint of his notes on the Roman and Canon Law, taken from the "*Horæ Juridicæ*," with some slight alterations and additions, was published in 1830.

Mr. Butler lived to witness two remarkable events, both of which he predicted,—the French Revolution of 1830, and our Parliamentary reform. Of the necessity of the latter, Mr. Butler was convinced, and his was the first name in the petition from the Bar in support of that measure. On the accession of the Whig party to power in 1831, one of the first acts of Lord Brougham, on his appointment to the Seals, was to offer Mr. Butler, in the handsomest manner, the rank of king's counsel, which by the Emancipation Act he was able to accept. His patent bears date the 5th of August, 1831.

In the spring of 1832 he was seized with his last illness, which, after six weeks, terminated fatally. He died on the 2d of June 1832, having preserved his faculties to the last. He left two children, by Mary, daughter of John Eyston, Esq. of Hendred, in Berkshire,—Mary, who married Lieut. Col. Stonor, and Theresa, who married Andrew Henry Lynch, Esq., one of the Masters in Chancery, and, for several sessions, M. P. for Galway.

Having given, as we promised, an account of the life of Mr. Butler, and his chief publications, it remains for us to consider his legal character. But before we proceed to so difficult a task, and to the end that we may go to it released from all other considerations, we will add in this place what little else we have to say respecting him. The leading feature of Mr. Butler's character was, without doubt, his constant self-employment, the result of his great capacity and love of labour. Not a moment of his time was lost, and few, very few, were given to what is generally considered amusement. By a rare endowment of nature, studies which to most are toils, afforded him ample relaxation. His favourite motto "*Le changement d'étude est toujours un delassement pour moi*<sup>1</sup>," prefixed to many of his works, was not adopted by him in a moment of industrious enthusiasm or scholastic vanity, but was the genuine expression of the principle which supported him in all his exertions. Upon

<sup>1</sup> D'Aguesseau.

his literary attainments we have already declared ourselves unable to pass judgment, and we think this confession will not lower us in the eyes of our readers. We may, however, be permitted to say, that we have perused most of his miscellaneous works, and never met with one which did not afford us much information and pleasure. The style in which they are written is peculiarly attractive, easy, and dignified, and, in his polemical writings, forcible. In religion, as is well known, he was a sincere and enlightened Roman Catholic. His politics were those of the whig party, except on the great question of the French Revolution, in respect to which he subscribed generally to the opinions of Edmund Burke, with whose friendship he was honoured. In his professional and private character Mr. Butler was respected by all who knew him. In matters of business, and with strangers, his manner was formal and reserved, but amongst his family and friends it was almost playful. Like most people who enjoy a strong constitution, his appetite was good, and he was not an enemy to convivial enjoyments, although he never attained the enthusiasm for wine which distinguished so many of the great lawyers of fifty years since. When young he was active, and took much exercise, but his avocations and pursuits afterwards necessarily interfered with this habit.

To the study of the law Mr. Butler brought great natural endowments: a comprehension which could easily master any matter, however vast or intricate, an attention always at his command, a retentive and ready memory, considerable reasoning powers, and, above all, a never-failing love of study, and particularly of the study of the law.<sup>1</sup> At an early period of his life he had amassed great stores of legal learning, and his notes to Coke on Littleton show that almost at the outset of his legal career he was perfect master of the law of real property. The feudal principles which form the roots of

<sup>1</sup> Upon this subject we beg leave to refer to the following passage in Mr. Butler's *Reminiscences*, i. p. 64.: — "It remains for the Reminiscent to enter his protest against the general opinion, that the law is a dry and unpleasant study: such he never found it, and such, he believes, it has never been found by any person who has applied himself to it with sufficient natural and acquired endowments, and a determined resolution not to be disheartened by its first difficulties."



that system, and the last refinements which legal reasoning engrafted upon it, were always present to his mind, and his general knowledge of the English Law, and likewise of the ancient Roman and Canon Law, and the laws of foreign countries, was very extensive. His opinion on difficult cases of domestic and foreign law was sought and prized to the last year of his life.

In the application of his knowledge to the practice of conveyancing, Mr. Butler was eminently successful, and, at the time when he was in full practice, he may be said to have united most, if not all, the merits which, in the MS. we have already quoted<sup>1</sup>, he ascribes to his learned predecessors. The general frame of his drafts was remarkable for order and correctness: the language was accurate and clear, and brevity was his constant aim. A greater conciseness has, indeed, been subsequently adopted, and, perhaps, may yet be attained (although it must be doubted whether the latter can be done without legislative assistance): still, the drafts settled by Mr. Butler, upon comparison with those of his predecessors, and even with those of many of his contemporaries, prove that a great abbreviation was effected by him; and when it is considered how much time is required, and how much responsibility is incurred, in determining what may be *safely* rejected in precedents which form the result of the learning and experience (often dearly bought) of centuries, Mr. Butler's merit in this respect cannot be considered trifling.

From what we have said it will be seen that Mr. Butler was a chamber counsel of the highest order, and there is reason to believe that, if his religion had not excluded him from the Bar till his habits were permanently fixed, he would have been equally successful in forensic advocacy. Our opinion does not rest merely upon surmise. In the great case of the Marquis of Cholmondeley v. Lord Clinton, after an adverse decision to Lord Clinton had been pronounced by Sir William Grant<sup>2</sup>, and when the cause came on for re-hearing before his successor, Sir Thomas Plumer, Lord Clinton retained Mr. Butler, and, at the age of seventy, Mr. Butler

<sup>1</sup> See *antè*, p. 117.

<sup>2</sup> 2 Merivale's Reports, 171.

for the first time addressed a Court. His argument was considered at least equal to any of those pronounced upon the occasion, and received the compliment of a separate notice in the report of the case<sup>1</sup>; and it should be observed, that among those who also addressed the Court will be found the distinguished names of Lord Cottenham, the present Lord Chancellor of Ireland, the present Vice Chancellor of England, Sir Anthony Hart, Sir William Horne, Mr. Bell, and Mr. Heald. Sir Thomas Plumer reversed the decision of his predecessor, and the House of Lords subsequently confirmed the reversal.<sup>2</sup>

If it rested here, Mr. Butler's claims on the profession and the public would consist in having efficiently and honourably filled the first post in one division of the law during a lengthened period; but Mr. Butler has other and more important claims.

For his great legal work, his notes to Coke on Littleton, both the profession and the public owe him a lasting debt of gratitude. Before they were published, the knowledge of the principles of the law of real property was necessarily confined to the few who had sufficient time, industry, and ability to read the vast body of Reports, and to extract the "maxims, rules, principles, and juridical traditionary line of decisions<sup>3</sup>," contained in them. Through this severe course of study Mr. Butler went, and gave to the profession the result of his labours in the work just alluded to. He there lays down, with the greatest accuracy and precision, and in beautiful and simple language, the principles which govern the whole law of real property, and the operation of the various instruments by which it passes from man to man, besides imparting much other valuable information. No legal publication, probably, ever diffused so much knowledge upon an abstruse and intricate subject in so clear and perspicuous a manner. A knowledge of the nature of Uses

<sup>1</sup> 2 Jacob & Walker's Reports, 29.

<sup>2</sup> Ibid, p. 189.

<sup>3</sup> "English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules, principles, and juridical traditionary line of decisions, contained in the notes taken from time to time, and published (mostly under the sanction of the Judges), called Reports."—*Burke's Works*, vol. ii. p. 608. (edit. 1834).

and Trusts, affecting, as they do, almost every acre in the kingdom, and the right use of the ordinary assurances, was placed within the reach of every intelligent and industrious country practitioner, as well as the most learned counsel of Lincoln's Inn: and the light which had hitherto burnt exclusively in the chambers of the latter, was diffused, by Mr. Butler, throughout the kingdom. We have already alluded to the very limited time allowed to Mr. Butler for his task, and to the comparative periods devoted by himself and his predecessor, Mr. Hargrave, to their respective portions of the work.<sup>1</sup> It remains for us to add, that the subjects of Mr. Hargrave's notes are chiefly difficult and abstruse questions of law, with which it was his delight to grapple, and that, although by the learned his notes are much prized, they fall short of Mr. Butler's in general utility.

Of his learned predecessor Mr. Butler thus speaks<sup>2</sup>: — "His annotations exhibit the most profound and extensive learning, and the finest discrimination. In the law of property, and many other branches of English jurisprudence, he was eminently learned: in the law of dignities, the prerogative of the Crown, and the history and principles of the constitution, he scarcely had an equal."

Mr. Butler's other legal work, — his edition of *Fearne on Contingent Remainders*, although far behind his notes to *Coke upon Littleton*, was both able and useful. Speaking of Mr. *Fearne's* book, Mr. Butler says, "No work, perhaps, on any branch of science affords a more beautiful instance of analysis; but it is not immediately perceivable by any person to whom both the subject and the work are not familiar. This is principally owing to the want of subdivisions of the text."<sup>3</sup> Mr. Butler supplied this deficiency, and added many valuable notes. His editions are, at the present time, in great request.<sup>4</sup> Mr. Butler, as we have already mentioned,

<sup>1</sup> See p. 118. *ante*.

<sup>2</sup> *Reminiscences*, i. p. 113.

<sup>3</sup> Preface to *Fearne's Contingent Remainders*, by Mr. Butler.

<sup>4</sup> We beg to subjoin the following interesting and characteristic letter from Lord Eldon, which will show the estimation in which that great Judge held Mr. Butler's labours: —

gave much time, towards the close of his life, to the consideration of the improvement of the law, upon which subject he entertained the most enlightened views. Of the attempts which were made, in his life-time, in this direction, he thus speaks, in a note appended to the last edition of *Fearne*.<sup>1</sup> They "reflect great honour on the persons engaged in them. The readiness of the highest and all other members of the legal profession to co-operate in this noble, arduous, and salutary undertaking, deserves the thanks of their fellow subjects, and completely refutes the charge, very inconsiderately brought against them, of a contrary spirit. Sir Robert Peel's five Acts of Parliament, the 7 & 8 Geo. 4. ch. 27, 28, 29, 30, 31, and Sir Edward Burtenshaw Sugden's six Acts, the 1 William 4. ch. 36, 40, 46, 47, 60, 65, possess every kind of legislative merit. All persons agree that by these Acts both have deserved well of their country, and that they will continue to deserve well of her by procuring other legislative acts equally valuable. We are also indebted to Sir Robert Peel for the Commissions on the Court of

April 19, 1822.

DEAR SIR,

Seeing your *Reminiscences* offered to the public, I have placed them in my library.

I wish I could satisfy myself that Lord Eldon was entitled to all the approbation which your partiality has bestowed upon him. I have ventured to think that my life exhibits a remarkable proof of what may be done, in a free country, by moderate talents and never-ceasing industry; but I have never presumed to think that I had the merit you have been pleased to think it good to ascribe to me. I have felt more consolation than I can express, in reading in a part of your work, what a considerable person stated in answer to the imputation of being dilatory. That has been often, and I admit most fairly imputed to me; and to all who accuse me of it, I wish to give as my answer the passage I allude to.

I must soon quit this scene. Whether any memory of me will survive me, I know not. But I hope I may have descendants professing the law, and if I have, as they must study the works of Charles Butler if they mean to understand their profession, those descendants at last will be taught to entertain, upon very considerable authority, a favourable opinion of the character of their ancestor.

Yours, Dear Sir,

To Charles Butler, Esq.

ELDON.

The passage referred to by Lord Eldon relates to the Chancellor D'Aguesseau, and will be found in the 1st vol. of Mr. Butler's *Reminiscences*, 4th edit. p. 285.

<sup>1</sup> *Fearne's Contingent Remainders*, by Mr. Butler, 1831, p. 626.

Chancery, on the courts of common law, and on real property. The Reports of the Chancery and Common Law Commissioners abound with useful information, and suggest most beneficial regulations. Those of the Real Property Commissioners are entitled to the same praise.<sup>1</sup> To these the attention of the editor has been particularly directed. After seriously considering them, he believes they do not contain a single suggestion for the alteration of the law which would not tend to its amelioration." Had Mr. Butler lived to see some of the able measures of law reform which have been carried out since his decease (amongst which we may particularly instance the Act for the Abolition of Fines and Recoveries, 3 & 4 W. 4., which was penned by one of his most gifted pupils,) they would doubtless have met with his cordial approbation. Much, however, remains to be done, and we are glad upon this occasion to be able to refer to the opinions of so eminent a man as Mr. Butler upon many of the remaining points. We have been favoured with a masterly paper prepared by him, and sent to the Master of the Rolls, the present Lord Chancellor, in February, 1827, and forwarded by the latter, we believe, to Sir Robert Peel, respecting the simplification of the law of real property, and which we propose to add by way of appendix to this article.<sup>2</sup> It embraces the abbreviation of deeds, the abolition of outstanding legal estates, and several other important points, and claims an attentive perusal from those engaged in law reform (more especially at the present moment). Registration, a measure intimately connected with the simplification of title, Mr. Butler considered<sup>3</sup> "necessary, expedient, and practicable." To the scheme of codification, proposed by Mr. Humphreys, and which has caused so much discussion, Mr. Butler was opposed.<sup>4</sup> Upon this subject he followed the opinion of Lord Bacon. "I dare not," said that great man, "advise to cast the law into a new mould. The work which I propound tendeth to pruning and grafting

<sup>1</sup> Mr. Butler was examined by the Commission. His evidence will be found in their First Report, p. 113.

<sup>2</sup> See p. 133. post.

<sup>3</sup> *Ibid.*, p. 626.

<sup>4</sup> *Ibid.*, p. 627., and see Memoir of D'Aguesseau, p. 60.

the law, and not to ploughing up and grating it again, for such a remove I should hold, indeed, for a perilous innovation.”<sup>1</sup> We should add, however, that Mr. Butler fully appreciated the abilities of Mr. Humphrey’s work, and thought it so important that he called public attention to it by a highly favourable notice in the *Quarterly Review*.<sup>2</sup>

To the titles of a great lawyer and an enlightened law reformer, Mr. Butler could add that of a successful legal preceptor, as the long list of his distinguished pupils shows. In it will be found the names of Preston, Humphreys, Duval, Brodie, Walters, Shepherd, and Measure, in the particular branch of the law to which Mr. Butler devoted himself, and to which several of those we have named applied themselves, by his advice. The names of Denman and Rolfe, two of the greatest ornaments of our Bench, will likewise be found in it, and those of many other distinguished living and departed lawyers might be added.

We have now performed our task, feebly, but we trust faithfully, and it only remains for us to say one word in parting. We are not conscious that we have anywhere departed from the strict line of justice and impartiality, and every word we have written has been submitted to learned and upright men, who have not disapproved of our efforts; and yet we feel that it is proper, upon the present occasion, to withdraw, at least in part, the editorial veil, and to acknowledge that the hand which has written these pages would naturally incline to praise. “*Non de domino sed de parente loquimur.*”<sup>3</sup> Supported, however, by the judgment of those to whom we have already alluded, we fear no unfavourable result from the caution, on the part of our readers, which we think it our duty to invite. On the contrary, our firm belief is, that the most minute review of Mr. Butler’s life, the most attentive consideration of his writings, and the most diligent inquiry amongst his contemporaries who yet survive, would only prove more clearly the accuracy and justness of all that we have advanced in the foregoing pages.

<sup>1</sup> Proposal for Amending the Law of England.

<sup>2</sup> Vol. xxxiv. p. 540.

<sup>3</sup> Plinii Trajano Paneg.

MR. BUTLER'S SUGGESTIONS FOR SIMPLIFYING THE  
MODIFICATION AND TRANSFER OF PROPERTY.

The following points seem to call for attention: —

*Can the deeds for settling and disposing of property be materially abridged?*

Here the material points for inquiry are —

1st. Whether the present forms of conveyance and settlement should be *altogether abrogated*, and new forms substituted in their stead? It seems very questionable whether any professional gentlemen of experience and authority would recommend so violent an operation.

2dly. Whether the present forms can be *materially abbreviated*? There is no doubt that such an abbreviation might be made by the general agreement of the profession to adopt such abbreviated forms; but whether such a general agreement could be obtained, must be considered questionable?

The next consideration is, whether it can be done by *Act of Parliament*? Now an act of Parliament may direct that every tenant for life under a settlement, or will, and his trustees, shall have such powers of leasing, enfranchising copyholds, partitioning, sale, exchange, and appointing new trustees, as are usually inserted in wills and settlements, specifying them at length, and directing them to be considered as inserted in every settlement.

The act might also provide that every person conveying or settling an estate should be considered as covenanting for the title absolutely, where he himself has no covenants for the title; and partially, where he has such covenants.

But it should be left to the discretion of the parties interested either to disclaim altogether, or to be entitled in a certain extent only to the benefit of such parliamentary provisions.

Similar enactments might be made in respect to all the other usual forms of conveyance.

There is no doubt that such a parliamentary provision would materially shorten the present length of deeds.

<sup>1</sup> See *antè*, p. 131.

II. *It has been suggested that recitals might be dispensed with altogether, or materially abbreviated.*

The suppression of recitals altogether appears to me impracticable.

It is essentially due to every trustee who conveys an estate, and to every person who advances money on the security of an estate, or for the purchase of it, that it should appear, on the face of the deed, that he conveys the estate or pays the money to proper persons. This can only be done by recitals.

That recitals may be abbreviated is generally true; but professional gentlemen might be mentioned, whose recitals admit of very little abbreviation.

III. *It is then to be considered, what can be done with outstanding legal estates, to render conveyances or assignments of them unnecessary.*

This is a most important consideration.

By the civil law, and the law of almost every country except England, when an estate is created for securing a sum of money, or for effecting any other purpose, the money intended to be secured, or the purpose intended to be effected, is considered to be the *primary object*, and the estate to be *an incident* to it; and therefore, when the money is paid, or the purpose effected, the conveyance or assignment of the estate ceases; or, as it is expressed by civilians, is extinguished. It is so by the English law in respect to bonds: on the payment of the money secured by it, the bond becomes a nullity.

But, with respect to estates, it is different in England. There, the estate is principally and in some manner solely considered in courts of law; so that, where there is not an express provision for effecting this extinguishment, the estate remains in the party after the object for which it was vested in him has ceased; and courts of equity consider his legal title to the land of so much importance, as to allow him to protect himself by the acquisition of it against all intermediate estates, interests, or charges.

This protection is so much engrafted into our law, that it cannot now be safely tampered with.

This circumstance makes the great difficulty of the case;



it would be easy to form an act that would transfer the legal estate to the person entitled to the beneficial interest of it. Little more would be necessary than to copy the statute for transferring uses into possession, passed in the reign of Henry the Eighth, adopting the provisions of it to trusts in their present state. But care should be taken to do it in such a manner as not to prejudice the rights of intermediate parties, where there are such rights; or to affect the protection which it affords to the owner of the land. This would require great attention, but it does not appear to the present writer to be absolutely impracticable.

At all events, a provision might be made that, *in future*, every estate or interest created for securing money, or for any other purpose, should cease, *ipso facto*, when the money is paid, or the purpose effectuated.

IV. *The remaining question is, whether titles, as they now stand, can be much simplified?*

The last suggestion will tend greatly to this effect.

Some parliamentary provisions might also be made, which would greatly facilitate personal representation. Some officer of the court of equity might be appointed to convey or assign estates or interests, when the person in whom they are vested cannot be discovered, or is under disabilities, or resides in foreign parts.

V. *It may be added, that parliamentary provisions might be made for settling disputed points respecting execution of powers, parol agreements, the alienation of the property of married women, and other disputed questions of law or equity, by which the transfer of property is at this time miserably embarrassed.*<sup>1</sup>

<sup>1</sup> These suggestions are of great importance, and will be read with much interest. The opinion of Mr. Butler, that the present forms of conveyances and settlement cannot be successfully abbreviated without legislative assistance, is in accordance with that which we have already expressed. We feel it again our duty to discountenance any individual attempt materially to abbreviate or alter the well-known common forms: some legislative sanction is necessary for this. One or two publications having this object have reached us since our last number, which we may hereafter notice more at length. We must also repeat, that so far as we can learn, no alteration has been made in the practice of conveyancing by reason of the statute 7 & 8 Vic. c. 76., and we have reason to believe that this Act will not only be repealed, but will in its most important provisions be fairly blotted out from the Statute Book. — Ed.

## ART. VIII. — MARRIAGE DE JURE AND DE FACTO.

1. DALRYMPLE v. DALRYMPLE, 2 Hag. C. R. 54.
2. The QUEEN v. MILLIS, 10 Cl. & Fin. 534.
3. CATHERWOOD v. CASLON, Excheq. 6 July, 1844.

THE three cases, which we have placed at the head of the present article, exhibit as singular an instance of fluctuation in legal opinions, as our juridical history has ever witnessed. In the first, we see a doctrine asserted by a Judge, whom the Lord Chancellor has proclaimed "the most learned ecclesiastical lawyer of his age." The doctrine is accepted, and maintained, for thirty years, by a succession of the brightest ornaments of the Bench and Bar, temporal as well as spiritual; when, lo! in the second case, we find it dividing the legal oracles of the House of Lords: and in the third the Court of Exchequer feels bound to repudiate it altogether!

The point, on which these very eminent and learned persons have differed, is whether or not, by the Common Law of England, the presence of an *episcopally* ordained minister be essential to the validity of a marriage. It is not now essential in England by statute; but the statutes of this class (with some special exceptions) do not extend to *marriages contracted on or beyond the seas*. Such marriages, it has been held, if valid by the law of the place of contract, are valid by the law of England. But there are thousands of her Majesty's subjects, of all ranks and degrees, now living, whose marriages, or those of their parents, were contracted where there was either no ascertainable law in force, or none but the Common Law of England, and where the ministration of an episcopally ordained minister could not be had, or if attainable would have been refused by the parties being members of the Church of Scotland, or other Protestant Dissenters. Weighty, indeed, must be the judgments, which would brand as concubines the pure-minded women,

who have for years trusted to the sanctity of unions so formed; and would stamp bastardy, with all its legal incapacities, on their innocent and unsuspecting offspring! If such be indeed the existing law of England, it is a disgrace to the age, and should be altered without a moment's delay. If it be not the law, as little time should be lost in clearing up doubts, which must cause grievous pain to susceptible minds.

It is admitted, on all hands, that the solution of the problem in question is only to be found in the history of the law, and accordingly most praiseworthy industry has been exercised, in exploring the receptacles of legal relics, and dragging forth from the dust of ages the long-forgotten monuments of barbarous legislation,—“*Juvabit*,” says Bacon, “*etiam antiquitates legum invisere; non abs re fuerit legum præteritarum mutationes et series consulere et inspicere.*” Far be it from us to reprobate the philosophy of this 86th aphorism! But, alas! the *History of the Law* forms amongst us, at the present day, no part of legal education! It is otherwise on the Continent. In the Universities of Paris, Berlin, Gottingen, Heidelberg, Jena, Tubingen, Leipsic, Erlangen, Bonn, Friburg, &c. &c. special courses of lectures are given on the history of Law in general, on the history of Law universal and comparative, on the history of the Roman Law, on the history of the French Law, on the history of the German Law, on the history of the European Constitutional Law, on the history of Judicial Laws, and, in short, on almost every branch of Juridical history. Deprived of such aids, we must find our way, as well as we can, through the “mutations and series” of our bygone laws; ever remembering, that all great changes in the constitution of society, or in the frame and tendencies of the public mind, infallibly draw after them corresponding modifications of the national jurisprudence.

Before we attempt, however, to investigate any problem, we must clearly understand its terms. If we would decide on the validity of a marriage, we must first know what the word “marriage” means. A familiar household word, no doubt, it is: and yet it is used in many different significations. In ancient Rome there were no less than three dif-

ferent kinds of marriage — *Confarreatio*, *Coemptio*, and *Usus*, with reference respectively to the religious, the civil, and the natural bond of union. So among the Jews, there were the *Pactionis libellus*, the *Nummuli datio*, and the *Coitus*. Again, marriage in Turkey admits of polygamy. The law of Scotland considers marriage to be a contract purely *civil*: the Church of England deems it a *spiritual* act: and the Church of Rome entitles it a *sacrament*. If in argument the major proposition relate to one of these significations, and the minor to another, the conclusion must needs be illogical.

Now, there is a most important distinction in our own law-books, namely, that between marriage *de jure*, and marriage *de facto*. This we shall here endeavour to elucidate; because we think it will serve to reconcile authorities, which have been deemed contradictory; and because the distinction seems, at times, to have been lost sight of, in arguments of great consideration and solemnity. Marriage *de jure* is, in our understanding of the term, strictly and properly an act which, according to the law and practice of Courts competent to decide on its legal validity, is held *conclusively* to bind a man and woman to each other as husband and wife. Marriage *de facto*, as distinguished from marriage *de jure*, is, in our apprehension, an act which, according to the law and practice of Courts competent to decide on it, as a matter of fact, is held *primâ facie* to bind the parties together as married persons, until otherwise determined by lawful authority. Judgments on marriage, considered in this latter aspect, are, it is manifest, of an interlocutory character, in their origin; though circumstances, which will be explained in the sequel, may give them (as the civilians say) “the force and effect of a definitive sentence in writing.”

The great and frequent changes of opinion, which, in the lapse of ages, the public mind of England has undergone, in regard to the sanctity and civil importance of the matrimonial union, account, in some degree, for that confusion and uncertainty, in which the laws concerning marriage have of late appeared to be enveloped. The only way, to find a clue to this labyrinth, is to begin with the earliest *distinct* traces

of the matrimonial jurisdiction, and follow with caution the changes which it underwent. We say emphatically the *distinct* traces; for we mean at once to discard two vague clauses in ordinances ascribed to Edmund, a Saxon King, and Lanfranc, a Norman Archbishop, which are alleged to have rendered the blessing of a priest essential to the validity of a marriage, in the 10th or 11th century. The authenticity of these obscure fragments of legislation is altogether doubtful: and in a pamphlet, which appeared pending the discussions in *Millis's case*<sup>1</sup>, it was shown, that if genuine, they prove nothing as to the essential validity of the marriage bond, at any time; that whatever they prove, they are not known to have been ever received as law, in any Court; and that if so received before the 13th century, the effect now ascribed to them was, from that time, directly contrary to the law and practice of the only Courts competent to entertain the question.

The pamphlet, just mentioned, proves that the foundations of the matrimonial law of England, as it has existed for seven or eight centuries, were laid in the establishment of the Ecclesiastical Courts by William the Conqueror; and it reviews the history of those Courts, so far as regards the jurisdiction of marriage. Of this survey we shall give a brief sketch; but shall divide it, with a view to our present inquiry, into *five* periods, beginning respectively with the establishment of the Courts,—the formation of a body of laws for their guidance,—the Reformation,—the Toleration Act,—and the Marriage Act of 1753.

I. By a mandate of the year 1085, William removed the Bishops from the Civil Courts, and gave them in England, as they had long before enjoyed on the Continent, an exclusive jurisdiction in *spiritual* concerns, among which marriage then held an undisputed eminence. During the whole of this first period, therefore, marriage *de jure* was exclusively under the ecclesiastical jurisdiction. In what way marriage *de facto* was then considered, does not distinctly appear; but we may reasonably conclude, that the limits between

<sup>1</sup> A Letter to Lord Brougham, on the opinions of the Judges in the Irish Marriage cases, by Sir J. Stoddart, LL.D. &c. 1844.

the two jurisdictions were much the same, as we find them in the age immediately succeeding.

II. The second period began about the middle of the twelfth century, when the Canon Law received a systematic form in the *Decretum* of the monk Gratian, as the Common Law, to a certain extent, did in the treatise of Glanvil. In the following century appeared the authoritative *Decretals* of Pope Gregory IX., and the valuable productions of Bracton and Fleta, and from these sources we have a clear view of the matrimonial jurisdiction in both its branches, *de jure* and *de facto*.

First, as to marriage *de jure*. The key to all difficulty, on this subject, is to be found in the religious opinions of an age eminently, and (as we now think) blindly religious. The Ecclesiastical Court was not a court of the king, or of the civil state: it was "*Curia Christianitatis*," the Court of the Christian community, governed by the Bishop as spiritual pastor, with an ultimate appeal to the Bishop of Bishops, the Pope. The law of the Court was not "the King's Ecclesiastical Law" (a phrase invented by the servile Parliament of Henry VIII.)—it was "the Law of Holy Church," set forth, not in statutes of kings or parliaments, but in decrees of popes, and canons of councils, and these again resting on the doctrines of theologians. Now, the great leading doctrine of the theologians of that day was, that *Marriage was a Sacrament*, which it is still held to be by all Roman Catholics. In the 13th century, this doctrine was received, as a matter of *faith*, by the whole community; the necessary consequence of which was, that the existence and validity of a marriage could only be determined by the law of the Church: and accordingly we find Archbishop Arundel, in 1408, expressly denouncing it as *heresy* to hold any doctrine concerning marriage contrary to the law of the Church, "*as set forth in the Decretum and Decretals*;" the punishment of heresy, on relapse, being, at that time, to be *burnt alive*.<sup>1</sup>

The law of the Church, "as set forth in the *Decretum* and *Decretals*," was, that "marriage is contracted by consent alone"—"that solemnities ought to be observed, but are

<sup>1</sup> Stat. 2 Hen. 4. c. 15.

not of the substance of marriage" — and that "though they be not observed, still the marriage holds good."<sup>1</sup> The Church, indeed, from the earliest times reprobated unsolemn marriages in the strongest terms: it represented them as, morally speaking, no better than fornication or adultery; but it thought that those, whom God had joined together, man could not put asunder; and therefore, far from even pronouncing them null and void, when once contracted by competent persons, it held them valid, to the full extent of voiding a subsequent marriage with another person, though the first had been quite secret, and the second public, solemn, blest, and consummated. This is authoritatively laid down in a Decretal of Pope Gregory IX. (A.D. 1230), which was cited *verbatim* by Lord Brougham in *Millis's* case. Well might Lord Denman ask, how any ordinance of the 10th or 11th century, supposing it had declared a marriage void for want of a priest's benediction, could continue to be received as law by an English Ecclesiastical Court, in the face of this decretal.

Unsolemn marriages, then, were *de jure* valid, but irregular. They were more or less irregular (and consequently more or less discountenanced by all Courts), in proportion as they omitted more or fewer solemnities. The cases doubtless were rare, in which all solemnity was omitted; because few persons would, in those days, wantonly brave, to that extent, the censures of the Church, the disfavour of the law, and the odium attached to such conduct by public opinion. Of those few cases, too, the records, which have come down to us, are of course much fewer. Still it does so happen, that we have notices of two cases, on the very point of this Decretal cited by Lord Brougham. One, of the 13th century, is to be found in *Coke upon Littleton*.<sup>2</sup> "A. contracts *per verba de præsenti* with B., and has issue by her, and afterwards marries C. *in facie Ecclesiæ*. B. recovers A. for her husband, by sentence of the ordinary." The other, of the 14th century, was quoted from the rolls of the province of York. "John de Steinbergh made a contract *cum copulâ* with Cecilia de Portynton, and afterwards married Alicia de Crystyndome

<sup>1</sup> Decretal, 4. 1. 1. &c. &c.

<sup>2</sup> 33 a. n. 10.

*in facie Ecclesiæ* : and on suit brought by Cecilia, the Ecclesiastical Court pronounced the marriage with Alicia *fuisse et esse* invalidum, and adjudged John *in virum legitimum Cecilie*." Here, observes the Lord Chancellor, in *The Queen v. Millis*, "the marriage with Alicia is pronounced not only to be, but *to have been*, void, agreeable to the rule of the Ecclesiastical Court, that when a marriage, voidable by reason of precontract, is annulled, it is annulled *ab initio*."

The Ecclesiastical Courts not only had jurisdiction on the validity of marriage *de jure*, but that jurisdiction was *exclusive*. This again is strongly, ably, and clearly put by the Lord Chancellor — "It must always be remembered (says his Lordship) that the Spiritual Courts were the *sole* judges of the lawfulness of marriage, where that question was *directly* in issue." "The discussion whether there be marriage or not (say both Bracton and Fleta) belongs not to the secular, but to the ecclesiastical judge."<sup>1</sup> When, therefore, a question, directly putting in issue the *right* of marriage, arose in the king's courts, they referred it to the bishop, to certify whether the marriage was lawful or not. In all such cases, the rule of the king's courts was, "that judgment must be given according to the Ordinary's certificate;" and when so given it was conclusive against all the world. For instance, in a case of alleged bastardy, where the bishop had certified the marriage of the parents to be lawful, "the effect of this proof of legitimacy (says Bracton) is, that when once it is proved, and a judgment given accordingly in the king's court, the individual shall be held legitimate always against all persons."<sup>2</sup> And so it was ruled A.D. 1309.<sup>3</sup> So much for marriage *de jure*, as determined by the Spiritual Courts, and recognised and carried into full effect by the King's Courts.

How, and to what extent, marriage *de facto* came to fall under the jurisdiction of the common law, is now to be explained. The lay judges, though they trembled to invade the spiritual sanctuary, were active and astute enough, in maintaining and extending their own jurisdiction over temporal concerns, in the name, and by the authority and power of the temporal sovereign. In the first place, therefore, they

<sup>1</sup> Br. 5. 19. 1.; 1. 6. 39.

<sup>2</sup> Y. B. 3 E. 2. M. T. 53.

<sup>3</sup> Br. 5. 19. 7.



prohibited the Ecclesiastical Courts from holding plea *de laico feodo*.<sup>1</sup> Secondly, they would not allow the bishop to certify marriage without a reference to him for that purpose from the king's courts.<sup>2</sup> And, thirdly, they would not make such reference, when the right of marriage was not directly in issue, or when the certificate might affect a person deceased, or otherwise incompetent to make defence. It must be remembered, that though marriage itself was deemed spiritual, the incidents to marriage, such as legitimacy, dower, tenancy by the courtesy, &c., were creatures of civil institution, and on this domain the churchmen strove in vain to encroach.<sup>3</sup>

There were two classes of cases, in which the *right* of marriage not being directly in issue, the King's Courts allowed a presumptive proof of marriage, founded on acts *in pais*, to entitle the parties to certain temporal privileges. Where the presumption arose from cohabitation and reputation, it was called marriage *in possession*; where it arose from an act of public betrothment, it was called marriage *in fact*. It would seem that the Common Law had laid down no positive rule, as to the kind or degree of publicity or solemnity necessary to the proof of a marriage in fact; or else that the rule had varied at different times. A certain degree of publicity, and a certain degree of solemnity would naturally be required. Some persons perhaps may have thought, that the ceremony should be performed in a church or chapel, or at a church door; others that a mass should be sung, or a benediction uttered, or a ring used; whilst others again may have been willing to dispense with all these, provided only that the party were not on his death-bed. One thing, however, is certain, that the rule recently suggested, which renders the presence of an *episcopally* ordained minister essential to the validity of a marriage, is to be found no where in the law—absolutely *no where*!—in no reported judgment, in no text-book or commentary, in no *dictum* of any Judge, scarcely in any argument of counsel! If deemed necessary, it was plainly not suffi-

<sup>1</sup> Glanvil. 12. 21.

<sup>2</sup> 2 Rol. 589. l. 50.

<sup>3</sup> About 60 years before the Statute of Merton, Pope Alexander III. claimed to decide on the *legitimacy* of an English lady, but was compelled to give up this point, as temporal, retaining, nevertheless, his spiritual jurisdiction on *marriage*. See *Observations on Lord Cottenham's Opinion*, pp. 19, 20.

cient, in the cases of *Foxcroft*<sup>1</sup> and *Del Heith*<sup>2</sup>, for the former was married by a bishop, and the latter by a priest, and yet the sons, in both cases, were held illegitimate; though, for aught that appears, both marriages might have been certified to be good by the ordinary, if reference had been made to him for that purpose. These were cases of bastardy. Now it is plainly laid down both by Bracton and Fleta, that if the party asserting his adversary's bastardy put it on the ground, that the father of the latter *never* married the mother, or that their marriage was *unlawful*, this was a question of marriage *de jure*, and was sent to the bishop; but if he put it on the ground, that he was born *before* his father's marriage, or begotten by *another man*, the right of marriage was not in issue, and the trial must be by a jury.<sup>3</sup> Hence the distinction, afterwards found in the books, between general and special bastardy, to the latter of which classes these cases evidently belong.

The circumstance, which has rendered the cases of *Foxcroft* and *Del Heith* (with some similar ones) such stumbling-blocks, in the investigation of the Matrimonial Law, is simply this — the decisions have been supposed to be given on marriage *de jure*, when they were really given on marriage *de facto*. In *Del Heith's* case it was clearly so; for the suit was on a writ of ejectment: and it is said "it was asked, *at the trial*, whether any espousals were celebrated between his parents in the face of the Church, and because *it was not proved* that John *Del Heith* was ever married to Katherine in the face of the Church, the *jury* found, that the plaintiff had no right to the lands." The question whether the private marriage, which was admitted to have taken place, was *valid* or *void*, was one to which the jury were totally incompetent, and on which they did not pretend to offer an opinion.

The King's Courts allowed different issues to be sent to trial, according to the nature of the suit. When the suit touched the right of marriage directly, they allowed the issue "*ne unques accouple en loial matrimonie*," to go to the bishop: when it concerned only a marriage in *fact*, or in possession, an issue "*Feme ou nient sa feme*" (or the like)

<sup>1</sup> Roll. Ab. 359.

<sup>2</sup> 34 Ed. 1.

<sup>3</sup> Br. 5. 19. 1.; Fle. 6. 39.

was sent to a jury.<sup>1</sup> The rules of evidence and procedure in the two Courts being so totally different, it is obvious that the decision of a jury, on the one issue, could in no degree affect that of a bishop on the other; far less could a verdict on a marriage *de facto* serve as a “test” of the validity of a marriage *de jure*: not to mention that the tests themselves might produce the most opposite results. “A marriage might be lawful as to the succession, and unlawful as to the action of dower.”<sup>2</sup> On the other hand, a marriage *de jure*, valid, but irregular, might, in consequence of that irregularity, be disallowed, in the King’s Courts, as insufficient *de facto* to entitle the parties to the particular civil right in question; for (says Lord Stowell) “the common law had scruples in “applying the civil rights of dower, and community of goods, “and legitimacy, in the cases of these looser species of marriage.”<sup>3</sup> But this could not affect a decision of the Ecclesiastical Court on the validity of such a marriage. “Rights of property, (as he elsewhere says) have nothing to do with marriage considered as to the *vinculum*.”<sup>4</sup>

Marriages *de facto*, then, might, according to circumstances, have been valid or void *de jure*. But we find a further distinction made by common-law writers between marriages *void* and *voidable*, which, according to Blackstone, turns on the nature of the disability to contract marriage; and he divides those disabilities into *canonical* and *civil*: the first comprising pre-contract, consanguinity, affinity, and personal infirmity; the second including a prior marriage, want of age, want of reason, and want of consent of parents. These distinctions are not very philosophical; since the last was neither canonical nor civil till 1753, and the preceding three, which he calls civil, are equally canonical. We shall therefore attempt another explanation of the matter. The term *voidable* is equivocal: in common parlance it would seem to signify something essentially valid, but capable of being *made void for the future*: here, on the contrary, it is applied to something apparently valid, but capable of being *declared void from the beginning*. Take, for instance, a case of con-

<sup>1</sup> Y. B. 18 Ed. 3. A.D. 1344; and 39 Ed. 3. A.D. 1365.

<sup>2</sup> Fleta, 5. 28.

<sup>3</sup> 2 Hag. 67.

<sup>4</sup> 1 Hag. 236.

sanguinity. Rolle says, "If a man marry his mother, they are husband and wife till the marriage is dissolved:" and for this, he quotes a judgment in the Year Book of 1430. Now, what Court ruled this? A lay Court, incompetent to decide on the validity of any marriage *de jure*, and which intended merely to decide, that the parties in this particular case were entitled to certain rights, on the *presumption, ex facto*, that they had contracted a valid marriage. Moreover, the presumption itself was pronounced defeasible, which at that time was inconsistent with marriage *de jure*, because *that* was deemed absolutely indissoluble. Now, suppose these same parties had gone before a competent Court; what would have been the language there held? The Court would have said, "You are not husband and wife, and *never were* so; your pretended marriage is no marriage at all: it was a nullity *ab initio*." So, in one of the cases of pre-contract before mentioned, the Court said, in substance, "You, John de Steinbergh, never were really married to Alicia: a mere 'show or effigy of marriage' passed between you; but it could not be a marriage *de jure*; for you were, at that time, the husband of Cecilia; and a Christian man cannot be at the same time the husband of two wives." Moreover, the common law itself treated such a marriage, when dissolved, as having been void *ab initio*; for it deprived the second wife of dower, and bastardised her issue<sup>1</sup>; which it could never have done if the right of the one had been vested, and the *status* of the other fixed, by solemnization.

The real and only distinction, at the time of which we are speaking, between the classes since called *void* and *voidable*, was a distinction in the practice of the common-law Courts. Both classes were essentially void by the canon law, to which they were both subject; but the circumstances of some marriages afforded a presumption in their favor, which was held sufficient at common law, until rebutted by the sentence of a competent Court. These marriages were called *voidable*, and until avoided were necessarily treated as valid. But others could offer, on the face of them, no such presumption. Marriage, being a contract, could not be even pre-

<sup>1</sup> 2 Co. Inst. 93.

sumably good, if made between parties incompetent, by defect of age or mental sanity, to contract at all. Whether or not they were so defective, was not a spiritual question, but a physical fact *in pais*, of which the country could judge quite as well, or better than the pope: and when the verdict of a jury had determined it in the negative, there was an end of the matter, in a Court which professed only to deal with marriage *de facto*. The judgment on such a verdict, though (as we have said) in strictness merely interlocutory, with reference to the right of marriage, came to have the force and effect of a definitive sentence; because the verdict itself could not well be gainsaid in any Court. The same reasoning would apply to a marriage under duress, though on that point some seem to have doubted.<sup>1</sup> The question of disability by a prior (solemnised) marriage was still more disputed. In a suit for dower in 1365, one of the judges appears to have thought that prior marriage was a question only fit for the Court Christian<sup>2</sup>; and in a case of bastardy in 1440, the same point being mooted, the report ends "*quære legem*."<sup>3</sup> But finally it was left to be tried by a jury<sup>4</sup>, probably because the presumptions from each solemnity being equal, the former, in point of time, must necessarily prevail, in a contract for life. It is obvious, however, that the second marriage is not absolutely void; for if the former be declared null by a competent Court, the latter, if properly contracted, must be valid.<sup>5</sup>

III. The third period of our historical survey begins with the Reformation. What change did that great event make in our matrimonial law? Did the Legislature take from the ecclesiastical Courts the jurisdiction of marriage *de jure*? On the contrary, it declared that all causes of matrimony appertained to the spiritual jurisdiction.<sup>6</sup> Did it abrogate the canon law previously received in those Courts, respecting marriage? On the contrary, it declared that such canons as were not contrary to the laws of the land should *continue* in force.<sup>7</sup> An attempt indeed was made to abrogate, in part, the decretal of Gregory IX. above mentioned, as "an unjust

<sup>1</sup> 1 Rol. 340. l. 20.<sup>2</sup> Y. B. 39 E. 3. 15.<sup>3</sup> Y. B. 19 H. 6. 32.<sup>4</sup> 1 Rol. 340. l. 13.<sup>5</sup> Cooke v. Browning, Arches, A.D. 1812.<sup>6</sup> Stat. 24 Hen. 8. c. 12.<sup>7</sup> Stat. 25 Hen. 8. c. 19.

“law of the Bishop of Rome.”<sup>1</sup> “This statute,” says the Lord Chancellor, “was pointed against the injustice of dissolving “by reason of precontract a marriage solemnized *in facie ecclesiæ*, and after consummation between the parties; but it “left the law, where there had been no consummation, as it stood “before;” and very early in the reign of Edward VI., the statute was repealed, and the law restored to its former state.

Accordingly, the ecclesiastical Courts continued to hold contracts *per verba de presenti* valid marriages, and public solemnizations with a third person, after such a contract, mere nullities; and the common-law Courts continued to recognise such judgments as lawful, and sufficient to convey titles to lands and goods. All this is clear from Bunting’s case<sup>2</sup>, which was merely the converse of the case in the thirteenth century, above cited from Coke upon Littleton. Here, A., the man, contracted with B., the woman. She afterwards publicly married C., and cohabited with him; but on suit in the ecclesiastical Court she was restored to A., and the marriage with C. was declared void *ab initio*: and on the ground of this sentence, the common-law Court held a son, whom she subsequently had by A., legitimate. In the very next year (1587), occurred the case of Edward Hampden’s daughter, whose marriage was dissolved *causâ præcontractûs*.<sup>3</sup> Shortly after these cases, Swinburne wrote his Treatise on Spousals—“a work (says the Lord Chancellor) of great learning.” He lays it down, in the most precise terms, that a consent *de presenti* is in truth very matrimony; that the parties to it are husband and wife, in respect of the substance and indissoluble bond of marriage; and that though one of them should afterwards marry a third person, in the face of the Church, and consummation should follow, yet the first contract is good, and shall prevail against the second marriage:” and he cites to this effect various passages of the Decretals, as being part of the canon law binding in England. This same canon law, as to marriage *de jure*, continued unaltered, except by the Commonwealth ordinance of 1653 and the statute relative thereto, for the remainder of this period. Attempts were

<sup>1</sup> Stat. 32. Hen. 8. c. 38.

<sup>2</sup> 4 Co. 29, a.

<sup>3</sup> 2 Co. Inst. 93.

made in vain to correct it by the *Reformatio Legum Ecclesiasticarum* in 1550, and by bills to restrain clandestine marriages, in 1666, 1667, 1677, and 1685; but none of these measures ultimately affected the general jurisprudence of the country.

IV. We come then to the Revolution of 1688.—The law of marriage *de jure* remained the same, from this epoch till 1753. Attempts indeed were made to restrain clandestine marriages by bills brought into parliament, in 1689, 1690, 1691, 1696, 1697, 1718, and 1735; but they all failed. The books of strict authority in ecclesiastical law, published during this period, were those of Ayliffe and Oughton, who both follow the doctrines of Swinburne. As to the practice of the ecclesiastical Courts, it is frequently alluded to, as matter of notoriety, in the common-law discussions of the time. Lord Holt in *Jesson's case* (A. D. 1703,) and in *Wigmore's case* (A. D. 1705,) distinctly states it to be such as we have described<sup>1</sup>; and the same was so asserted, without dispute, in *Holt v. Ward* (A. D. 1732).<sup>2</sup> It has been erroneously supposed to have been ruled differently in *Haydon v. Gould*, (A. D. 1710)<sup>3</sup>, but there the *regularity* of the marriage only was in issue, not its *validity*; and it was held (though the ecclesiastical Courts seem afterwards to have relaxed that strictness), that an irregular marriage (ex. gr. in a Sabbatarian congregation) would not entitle a party claiming under it to an administration, which was expressly demanded as a “right due by the ecclesiastical law,” and properly so described; for though regulated by various statutes, it was derived from the ancient jurisdiction of the ordinary. The judgment no doubt was grounded on the rule, “*frustrà Ecclesiæ auxilium implorat, qui ejus contempserit auctoritatem.*”<sup>4</sup> This rule, however, did not prevent a party who had contracted a valid but irregular marriage, and was therefore in contempt, from offering to purge the contempt by a regular solemnization. Accordingly we find a Quaker woman alleging a contract *de presenti*, and citing the man to solemnize.<sup>5</sup> So, on a marriage

<sup>1</sup> 2 Salk. 437.

<sup>2</sup> 2 Stra. 937.

<sup>3</sup> 1 Salk. 119.

<sup>4</sup> Sanchez, iii. 42. 2.

<sup>5</sup> *Haswell v. Dodgshon*, Deleg. 1730; Letter to Lord Brougham, 59.

contract *per verba de presenti*, between Jews, and a suit to compel solemnization, the libel was admitted, but the proof failed<sup>1</sup>; so, where the parties had read the words of the English ritual, but not in the presence of a clergyman, it was established as a marriage, and solemnisation decreed.<sup>2</sup> Sir E. Simpson, at the conclusion of this period, thus briefly sums up the law as then practised: "The canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnities according to English rites;"<sup>3</sup> and Lord Hardwicke shows its recognition by the common law,— "Where a marriage is in fact, or in a contract *in presenti*, or in a suit for restitution of conjugal rights, a sentence in the Ecclesiastical Court will be conclusive, and bind all; but not if given in a collateral suit."<sup>4</sup>

How far a marriage of Dissenters may have been allowed as a marriage *de facto*, previously to this time, is somewhat doubtful. But the Revolution, which now occurred, caused one of those mighty changes in the frame of English society, which could not fail to leave deep traces on the national jurisprudence. Among its first and most distinguished fruits was the Toleration Act, stat. 1 W. & M. sess. 1. c. 18. Protestant Dissenters were, for the first time, constitutionally recognised, as entitled to full protection in the peaceful exercise of their religion, and could not be prosecuted in an ecclesiastical Court for not conforming to the Church of England. Two years after this, the bill of 1690 to restrain clandestine marriages was brought in, which, for the first time in Parliamentary legislation, proposed to make all such marriages *void*. It was thereupon moved, "that the Act should not *extend* to the marriages of Quakers," clearly implying that, but for the proposed law, their marriages would be good either *de jure* or *de facto*. The bill indeed dropt; but soon afterwards occurred the case of *Hutchinson v. Brookbank* (A. D. 1694).<sup>5</sup> Hutchinson and his

<sup>1</sup> *Da Costa v. Villareal*, 1793, 1 Hag. C. R. 242.

<sup>2</sup> *Leeson v. Fitzmaurice*, Deleg. 1792; Letter to Lord Brougham, 59.; Observations on Lord Cottenham's opinion, 56.

<sup>3</sup> *Scrimshire v. Scrimshire*, 1752, 2 Hag. C. R. 400.

<sup>4</sup> *Roach v. Garvan*, 1748, 1 Vez. 157.

<sup>5</sup> 9 Lev. 376.



wife had been married in the face of a dissenting congregation, and were afterwards libelled in an ecclesiastical Court for fornication. They thereupon applied for a prohibition, suggesting that their marriage was protected by the Toleration Act, and leave was given them to declare in prohibition, which clearly showed, that the Court inclined in favour of their suggestion. The King's Court, therefore must at least have regarded it as a marriage *de facto*; and though the matter appears to have dropt, yet its impression was very effectual; for we never afterwards hear of any attempt by the ecclesiastical Court to disturb married Dissenters, on such a pretext, either before or after stat. 27 Geo. 3. c. 44., which only protects persons *lawfully* married.

An Act of 1695<sup>1</sup> adverts to "marriages or pretended marriages" of Quakers and Jews; and declares, that they shall be of the same force and effect, as if the Act had not been made. Here again we have an evident implication, that some of them at least may have been good, either *de jure* or *de facto*.

In Wigmore's case (A. D. 1705), there was an Anabaptist marriage, on which the wife sued in the Spiritual Court for alimony, and the King's Court refused to prohibit. My Lord Holt gave a strong opinion, that this was a valid marriage *de jure*, and he certainly did not intimate, that he would not have held it good *de facto*.

Fielding's case, which occurred in the same year<sup>2</sup>, was one of bigamy, for which offence (according to Coke) an un-avoided marriage *de facto* supports the indictment. In the disputed marriage, there was no regular solemnisation. A sort of ceremony indeed was performed by a *Romish priest*; but the judge did not rest the legality of the marriage on that fact alone. He merely mentioned it as *one of the circumstances*, from which the jury might infer a marriage *de facto*, as he probably would have done, had a minister of any other communion intervened. Indeed, after the indulgence given by the Toleration Act to Protestant Dissenters, it would have been strange to refuse to their ministers a privilege conceded to Romish priests, few of whom could at that time be

<sup>1</sup> Stat. 6 & 7 Will. 3. c. 6. s. 63.

<sup>2</sup> 14 St. Tr. 1327.

in the kingdom without incurring the guilt of treason. Yet strange to say, this very case of Fielding seems to be the sole authority (except the obscure fragments of Edmund and Lanfranc) for holding *episcopal* ordination to be the test of a lawful marriage! In 1710 occurred the above-mentioned case of a Sabbatarian marriage, in which, though the ecclesiastical Court refused the husband administration, yet it was said, "the wife, who is the weaker sex, and the children, who were in no fault, may entitle themselves to a temporal right by such a marriage." If so, it was clearly, by law, a marriage *de facto*.<sup>1</sup>

In 1718 another bill was brought into the House of Commons, to prevent clandestine marriages; and on this occasion a clause was agreed to *by the whole House*, "that the Act should not extend to *prejudice* the marriages of Quakers, *solemnised* by Quakers, between Quakers." One branch of the Legislature, then, at least, recognised those marriages as including a public solemn betrothment, and conveying some legal rights, which would seem, on principle, to be all that is essential to a marriage *de facto*. And indeed we find it laid down about this time in a work of repute, "that a marriage *de facto*, or in reputation, *as among the Quakers*, hath been allowed by the temporal Courts to be sufficient to give title to a personal estate."<sup>2</sup>

V. We now reach the fifth period of the Matrimonial Law. Lord Hardwicke's bill was enacted in 1753. We shall not here dwell on the inconsistencies and iniquities of that Act. They have been fully set forth in one of the pamphlets before referred to.<sup>3</sup> Happily, it has ceased to disgrace our statute-book; and we shall only observe, that by rendering all marriages in England null, which were not solemnised according to its enactments, it gave to the common-law Courts a concurrent jurisdiction on marriage *de jure*. Our present concern, however, is not with the cases under the Act, but with those exempt from its mischievous operation; viz. those of Scotch marriages, marriages between Quakers and between Jews, and marriages solemnised beyond the seas, including those on the sea, and in Ireland.

<sup>1</sup> Haydon v. Gould, ut sup.

<sup>2</sup> Wood's Inst. b. 1. c. 6.

<sup>3</sup> Letter to Lord Brougham, p. 67.

The Scotch marriages were treated on the same principles as those beyond the seas, which we shall presently consider.

Jewish marriages, both before and after the Act, were probably considered as governed by a foreign law (namely, that of the Hebrew people); of which law the Courts received evidence, as of a matter of fact.

The marriages of Quakers require more particular examination. "The case of the Quakers," says the present Lord Chief Justice of the Common Pleas, "is certainly one which it is *difficult* altogether to dispose of." The Lord Chancellor says, "It is of *difficult* solution." And Lord Cottenham says, "I have felt the fact, that such marriages have been recognised in several cases, very *difficult* to be explained." Now, this difficulty does not seem to strike Lord Brougham, Lord Denman, or Lord Campbell. They all think it clear that the Act contemplates the marriages of Quakers as good. Let us look, then, at the provisions of the Act. Sir Nicholas Tindal suggests, that the exception of the marriages of Quakers and Jews "amounted to a tacit acknowledgment by the Legislature, that a marriage solemnized with the religious ceremonies which they were respectively known to adopt, *ought* to be considered sufficient." But other sects were known to adopt religious ceremonies fully as much entitled, as those of Quakers and Jews, to the favour of the Legislature; for instance, the Sabatarians, who used the form in the Common Prayer-book, excepting the ring: it could not, therefore, be from any consideration of the ceremonies, that these two classes of marriages alone were deemed valid. Besides, the statute does not say they shall be valid: it only applies to them a well-known formula — "this Act *shall not* extend" to such and such marriages. It would be a perfectly novel mode of construing that formula, to read it, "this Act *shall* extend to certain marriages heretofore void, and *shall* render them henceforward valid." The section immediately preceding says, "this Act shall not extend to any marriages of the Royal Family." Did any body ever dream, that marriages of the Royal Family were void before the Act, and were made valid by the Act? The only intelligible exposition of the

clause in question is, that it leaves the marriages of Quakers exactly as they were. If, therefore, we find this class of marriages uniformly recognised as valid after the Act, we must conclude that they were held so (either *de facto* or *de jure*) before the Act; but before the Act they were not legally distinguishable from other marriages of Protestant Dissenters; therefore before the Act all marriages of Protestant Dissenters must have been held valid, either *de facto* or *de jure*. If, again, we are asked, why Quakers were more favoured by the Act than other Dissenters, we fear no better reason can be given than their unbending firmness. A Presbyterian, or an Anabaptist (it may have been thought) would submit to be married in a church,—a Jew, or a Quaker, never.

That Quaker marriages have been recognised in several cases since the Act, is notorious; and, as Lord Cottenham candidly admits, “it is impossible not to feel the importance of that fact.” In the very year 1753, an Anabaptist marriage, which, being before the 25th of March, 1754, could not be affected by the Act, was allowed as the ground of a suit for criminal conversation, in *Woolston v. Scott*, coram Denison J., at Thetford, and a verdict obtained for 500*l*. On this case Buller J. observes, “It has been doubted whether the ceremony must not be performed according to the rites of the Church; but as this is an action against a wrong-doer, and not a claim of *right*, it seems sufficient to prove the marriage *according to any form of religion*; as in the case of Anabaptists, Quakers, or Jews.”<sup>1</sup> Now, this is only saying, in other words, “As against a wrong-doer, in an action of tort, a marriage *DE FACTO*, *without the presence of an episcopally-ordained minister*, was held, before Lord Hardwicke’s Act, and should still be held, sufficient. Accordingly, a Quaker marriage was held sufficient, in a like action, as cited in 1776 by Willes J., in *Harford v. Morris*.<sup>2</sup> And again in 1829, in *Deane v. Thomas*.<sup>3</sup> So, as to personal property, “Widowers and widows,” says Lord Campbell, “being Quakers, and the children of Quakers, have received

<sup>1</sup> Buller, N. P. 28.    <sup>2</sup> 1 Hag. C. R. Ap. 9.    <sup>3</sup> 1 Moo. & Mal. N. P. 361.

*administration* in the ecclesiastical Courts; and in cases of intestacy, have succeeded to personal property according to the Statute of *Distributions*." So, "in tracing a title to real property," adds his Lordship, "no objection has ever been made, on the ground that it had been in a Quaker family; and no doubt has existed that the eldest son of a Quaker marriage would take, by descent, lands of which his father died seised in fee simple." So in a devise of lands in Ireland<sup>1</sup>, Lord Chancellor Manners held, in 1824, that Quaker marriages were meant to be included in the Irish Statute 21 & 22 Geo. 3. c. 25., which was a declaratory Act for the removal of any doubts which *might have arisen* concerning marriages between Protestant Dissenters, and applied to all such marriages theretofore entered into, or that should thereafter be entered into, and declared and enacted that they should be, and be held good and valid, to all intents and purposes whatever. Nor must we omit to notice an expression of the great Lord Mansfield, who, having laid it down in *Morris v. Millar* (A. D. 1767), that a marriage in fact was necessary to support a suit for criminal conversation, says afterwards, in *Birt v. Barlow* (A. D. 1779), "There are marriages among *particular sorts of Dissenters*, where the proof by a register is impossible:" evidently treating those marriages, as marriages in fact.<sup>2</sup>

It has been urged, as an objection to Quaker marriages, that the ecclesiastical Court will not grant restitution of conjugal rights on them.<sup>3</sup> But if this be now the practice (which may be doubted), it must rest on no objection to the validity of the marriage, but to the mode of its celebration, which the ecclesiastical law may designate clandestine, and may therefore apply to it the rule "*Petens restitutionem uxoris non auditur de jure, ubi matrimonium est contractum clandestinè.*"<sup>4</sup>

The last exception in Lord Hardwicke's Act is that of marriages solemnized *beyond the seas*. These, with which Irish and Scotch marriages may be classed, remain, both *de jure* and *de facto*, as they were before the Act. The first

<sup>1</sup> *Haughton v. Haughton*, 1 Molloy, 611.

<sup>2</sup> *Green v. Green*, 1 Hag. C. R. Ap. 9.

<sup>3</sup> Dougl. 171.

<sup>4</sup> Atho, ad Const. innotuit.

general rule is, that if they are valid by the *lex loci contractus*, they are valid here. This rule, though now familiar to all our Courts, does not seem to have been received till some time after the Marriage Act. It was strongly argued for by Sir E. Simpson in *Scrimshire's case*, above cited, and is supposed to have been adopted, as to Scotch marriages, by the delegates in *Compton v. Bearcroft* (1769); though this is doubtful. It seems to have been recognised in Chancery in a case, in 1781<sup>1</sup>, and was adopted, on full plea and proof of the law of Scotland, in *Beamish v. Beamish* (1793). In that year, too, it was held, that if proved as a marriage *de facto*, it would carry dower.<sup>2</sup> To many cases, however, the general rule will be found inapplicable; as where no local law is ascertainable, or where, if ascertained, it may be found to shock our notions of rectitude, or where extraneous circumstances render strict compliance with its dispositions impossible. In all such cases a marriage *de jure* or *de facto*, which would have been good, as such, if contracted in England before 1753, must be good at present, to the same extent, if contracted abroad.

Now we have seen, that in England, before the Act, marriages *per verba de præsenti*, without the presence of an episcopally-ordained minister, were allowed as marriages *de jure*; and marriages of Quakers, Anabaptists, and Jews (where, of course, no episcopally-ordained minister was present), were allowed as marriages *de facto*: there can, therefore, be no ground for holding the presence of an episcopally-ordained minister indispensable to a marriage beyond the seas, *de jure*, or *de facto*. Accordingly, in *Harford v. Morris* (1776), Sir G. Hay held, that the parties being *in itinere*, their marriage at Ypres was not subject to the local jurisdiction, and that though celebrated by a Calvinistic chaplain, yet it was a good marriage *de jure* by the law of England. In *Rex v. Brampton*, where the marriage was in St. Domingo, Lord Ellenborough did not hold, that it was necessary, by the common law of England, that the person officiating should be episcopally ordained. On the contrary, he said, "A con-

<sup>1</sup> Lib. Reg. A. 1780., f. 552.

<sup>2</sup> *Ilderton v. Ilderton*, 2 H. Bl. 145.

tract of marriage *per verba de præsenti* would certainly have bound the parties before the Act.”<sup>1</sup> In *Lautour v. Teesdale* (1816), where the marriage was at Madras, Lord Chief Justice Gibbs did not hold the presence of an episcopal clergyman necessary; on the contrary, he said, that “before the Marriage Act, a contract *per verba de præsenti* was considered to be an actual marriage.”<sup>2</sup>

It seems generally admitted, that the marriage law of Ireland, where not varied by statute, is the same now, as that of England was before the Marriage Act; and that in Ireland, as well as in England, a marriage *de facto* will support an indictment for bigamy. Now, we find indictments for bigamy sustained on Irish marriages at common law, without an episcopal minister, in the following cases, prior to that of *Millis*, viz.: *Murray’s*, coram *Silvester R.* (1815); *Marshal’s*, coram *M’Lellan B.* (1828); *Wilson’s*, coram *Torrens J.* (1828); *M’Laughlin’s*, coram *Moore J.* (1831); *Robinson’s*, coram *Foster B.* (1838); *Halliday’s*, coram *Pennefather B.* (1838); and *Ancruey’s*, coram *Crampton J.* (1841). The first of these was tried in London before the Recorder, who consulted on it with the then Attorney and Solicitor-General and some of the Judges; and the case was taken up in Parliament by Sir S. Romilly, as one of hardship on the facts; but nobody disputed the law. The other trials were in Ireland. Here is, then, a *series rerum judicatarum*, proceeding uniformly for twenty-six years on the principle, that the presence of an episcopally-ordained minister is *not necessary* to a marriage *de facto* at the common law of this country.

Numberless have been the opinions both of civilians and common lawyers, of the first eminence, to the same effect. We need only mention two. In 1804, that learned and careful investigator of legal doctrines, the late Mr. Justice Holroyd, gave a most elaborate opinion in favour of a marriage had at Gibraltar, where the ceremony was performed by a person *not in orders*; and he held, that by the law of England, exclusive of the Marriage Act, such a marriage would be deemed valid.<sup>3</sup> In 1818, Sir C. Robinson, afterwards Judge

<sup>1</sup> 10 East, 288.

<sup>2</sup> 8 Taunt. 387.

<sup>3</sup> Observations on Lord Cottenham’s Opinion, Appendix.

of the Admiralty, Sir S. Shepherd, afterwards Chief Baron of Exchequer in Scotland, Sir R. Gifford, afterwards a Peer and Master of the Rolls, Mr. Sergeant Lens, Mr. Cooke, Mr. Bosanquet, afterwards a knight and Justice of the Common Pleas, Dr. Swabey, and Dr. Lushington, now Judge of the Admiralty, all joined in an opinion, that the marriages of British subjects in India by ministers of the Church of Scotland (of course, not episcopally ordained), were then governed by the law of England, exclusive of the Marriage Act, and *would be considered in Courts of Common Law as marriages de facto.*<sup>1</sup> And we happen to know that Sir Samuel Romilly and Sir Arthur Pigott coincided in the same opinion.

We have but little space for the application of the principles deducible from our historical survey to the three cases placed at the head of the present article.

1. *Dalrymple v. Dalrymple* (A.D. 1811). Mr. Dalrymple made a contract *per verba de presenti* in Scotland, with Miss Gordon, no other persons being present. He afterwards came to England, and here married Miss Manners *in facie Ecclesiæ*. Miss Gordon brought a suit for restitution, in the Consistory of London, where the contract with her was pronounced to be a valid marriage, by the law of Scotland, and the marriage with Miss Manners to be null and void; and this judgment was unanimously affirmed by a full bench of Delegates, including Judges of the Common Law and civilians. In the course of Lord Stowell's judgment (one of the most splendid pieces of judicial eloquence ever delivered from any bench), that great lawyer, speaking of the time before Lord Hardwicke's Act, laid it down:—

“ 1. That the *Ecclesiastical* Courts of this country, which had the cognizance of matrimonial causes, enforced that rule of the canon law, which held an irregular marriage constituted *per verba de presenti*, not followed by any consummation shown, *valid* to the full extent of voiding a subsequent regular marriage contracted with another person.”<sup>2</sup>

“ 2. That the same doctrine was recognised by the *tem-*

<sup>1</sup> Letter to Lord Brougham, Appendix, No. II.

<sup>2</sup> 2 Hag. C. R. 67.



poral courts, as the existing rule of the matrimonial law of this country."

These doctrines relate to marriage *de jure*: and it would be superfluous to observe how fully they are borne out by the authorities above cited. For the first, we need only refer to the Decretal of 1230, and the extracts from Swinburne; for the second, to *Bunting v. Lepingwell*, and *Roach v. Garvan*.

2. *Regina v. Millis* (A. D. 1844). Of this very voluminous case, an extremely compressed account was given in our last Number. It was there considered as involving a decision of the House of Lords unfavourable to the doctrines of Lord Stowell: and such, no doubt, will be the *prima facie* impression derived from these proceedings by the legal public in general. But with reference to the principles above stated, the case will present itself in a new and very important aspect.

George Millis, a member of the Established Church of Ireland, married in that country Esther Graham, a presbyterian, in presence of a presbyterian minister. He afterwards, in her life-time, married another woman by the rites of the Established Church. He was thereupon indicted in Ireland for bigamy, and on a special verdict, a majority of the Irish Judges held, notwithstanding the long series of judgments to the contrary, that the first marriage would not support such an indictment, and that he must, therefore, be acquitted. This judgment was brought by writ of error before the House of Lords, who took the opinion of the Judges on two questions. Nine Judges assembled, and "after considerable fluctuation and doubt," agreed in opinion "that by the law of England, as it existed at the time of passing the Marriage Act, a contract of marriage *per verba de presenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the celebration of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence, and with the intervention, of a minister in holy orders." They said also, that "admitting, for the sake of argument, that the law had held a contract *per verba de presenti* to be a marriage, yet looking to the statute on

which the indictment (in *Millis's case*) was framed, the offence of bigamy could not be made out by evidence of such a marriage as this." And they further observed, that "the statute of 58 Geo. 3. c. 81. had enacted, that no suit should be had in any Ecclesiastical Court in Ireland to compel the celebration of such a contract." These opinions were delivered by Lord Chief Justice Tindal (7th July, 1843), together with various reasons of his own in their support; for which he declared that his learned brethren were not to be held responsible. The Lords debated on the case at distant intervals, and at length, on the 29th of March, 1844, the judgment of the House was given, affirming the judgment of the Court below. This is all that appears on the *Journals*: and so far the House of Lords may be thought to have given a *decision* on the law of the case. But if we examine the *Minutes*, we shall find these additional circumstances. The House divided — "*the votes were equal* — whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, it was determined in the negative. *Therefore* the judgment of the Court below was affirmed."

To understand how these proceedings bear on Lord Stowell's doctrines, we must look to the *speeches* of the law lords. Lord Abinger spoke very shortly; he said he had not had an opportunity of making any investigation in private on the subject; and though he agreed in the opinion of the Judges, he made no allusion whatever to the case of *Dalrymple*. Lords Brougham, Campbell, and Denman, on the contrary, spoke of the judgment, in that case, in terms of the highest admiration, and fully subscribed to all its doctrines. The Lord Chancellor quoted it at great length; he showed its accordance with Swinburne, Ayliffe, Sir E. Simpson, Lord Holt, and Blackstone, in proving that a contract "*per verba de præsentibus*" was (prior to 1753) considered to be *marriage* — that it was in respect of its constituting the substance and forming the indissoluble knot of matrimony, regarded as *verum matrimonium*." In coming to this conclusion, his Lordship wholly disregarded Sir N. Tindal's main authorities: he did not even mention the fragments of Edmund and Lanfranc, and he thought it plain, that Lord Holt spoke of the canon law *received in England*.

His Lordship however observed, that such marriages were irregular—that they were destitute of many legal effects which belonged to marriages duly solemnised—and that this was fully admitted by Swinburne, Sir E. Simpson, and Lord Stowell himself. He then went into an able review of the many particulars, in which such a want of civil efficacy was clear; and after urging reasons to show generally, that an unsolemnised marriage would not support an indictment for bigamy, he added, that the effect of the statute 58 G. 3. c. 81. had been to change entirely the character of a contract *de presenti* in Ireland, as the Act of 1753 had done in England; and, upon the whole, his Lordship held that Millis was not guilty of bigamy. Our readers will observe, that the statute of 58 Geo. 3. c. 81. was passed seven years after Lord Stowell's judgment in Dalrymple; and that from that judgment the Lord Chancellor did not, in the slightest degree, dissent. In fact, the only law lord, who did so, was Lord Cottenham, who on this point, as on every other, adopted implicitly the reasoning of the Lord Chief Justice of the Common Pleas. Thus it will be seen, that the House of Lords was so far from repudiating Lord Stowell's doctrines on marriage *de jure*, that of the peers who took part in the discussion of them, four to one were in their favour. The only point decided was on marriage *de facto*, in Ireland.

3. *Catherwood v. Caslon* (A. D. 1844). The marriage was between two British subjects, in Syria, in the house of the British consul. The English ritual was read by an American missionary, who is assumed not to have been episcopally ordained. Every circumstance of publicity attended both the ceremony and subsequent cohabitation, and there was issue. The husband brought an action for crim. con., and obtained a verdict, with 200*l.* damages; and on a motion in the Exchequer for a new trial, a special case was made for the judgment of the Court. After argument, it stood over, to await the decision of the Lords in *Regina v. Millis*; and on the 6th of July, 1844, judgment was given. We take the report from the best sources, to which we have access; and should it be found in any degree incorrect, we trust it will not be imputed to a want, on our part, of that unfeigned respect, which we entertain for the learned barons. It is stated

to have been said: "It has been decided by the House of Lords in *Regina v. Millis*, that unless in the presence of a minister in episcopal orders, a contract *per verba de præsenti* does not constitute a valid marriage, at the common law of this country; and by the authority of that case we are bound."

We are but too sensible, that to doubt the judgment of so highly respectable a tribunal<sup>1</sup> may expose us to the imputation of an overweening confidence in our own very humble attainments; but when we reflect, in the words of Lord Brougham, that "marriages innumerable have been contracted, both by sectarians in this country, and by persons of all descriptions in our vast possessions beyond the seas — possessions on which the sun never sets — all of which are now alleged to be void, all these parties fornicators and concubines, all their issue bastards," we feel, that we should be abandoning our duty to our readers, if we did not fairly and honestly state two objections, to which, after the most diligent and impartial examination, we think this judgment (as hitherto reported) is liable.

1. We submit, with great deference, that the point for decision by the House of Lords in *Regina v. Millis* was not whether the presence of a minister in episcopal orders was, or was not essential to the constitution of a valid marriage, at the common law. The Lord Chancellor, in that case, expressly said, "The immediate point for decision is, whether the defendant George Millis is, under the circumstances stated in the special verdict, guilty of the crime of *bigamy*." One of the reasons, which his Lordship stated (and in our opinion by far the most weighty) was deduced, not from the *common law*, but from the *statute* of the 58th of Geo. 3. c. 81., "the effect of which statute (he states) has been to change entirely the character of a contract *per verba de præsenti*, at least as to its temporal effects:" and among the circumstances stated in the verdict, was the date of the first marriage, which was subsequent to that statute. Now, as the House divided two and two, if one vote, out of four, was given chiefly (or but partly) on the effect of the statute, how can it be said, that the House determined a point of common law; more espe-

<sup>1</sup> Parke, Alderson, and Rolfe, Barons.

cially a point touching the effect at common law of a contract entirely changed by that very statute? It seems to us that, on the issue stated by the Lord Chancellor, the prisoner had as much right to avail himself of a statute passed before both his marriages, as of the common law: and he did avail himself of a statute in argument: and that argument is acknowledged to have had great weight with at least one of the only two judges, who voted in his favour. Again, the Lord Chancellor held, that "the Spiritual Courts were the *sole* judges of the *lawfulness* of marriage, where that question was directly in issue"—that those Courts considered a contract *per verba de presenti* (without the presence of any minister) to be "a marriage"—and that their opinions were "confirmed by *common-law* authorities, of the most respected and highest character." How can it possibly be said then, that his Lordship's vote established, or helped to establish the doctrine, that such a contract was not a valid marriage, at the common law? A marriage pronounced, by the sole judges of its lawfulness, to be lawful, has always been received at common law as valid and effectual. "The bishop's certificate" (says the Lord Chancellor) "was conclusive." "The law of those Courts" (says Lord Cottenham) "must have been at all times the law of the country." "All titles whatever under a marriage" (says Lord Keeper Guildford) "must, even at *common law*, stand or fall by the sentence in the Ecclesiastical Court." "A sentence in the Ecclesiastical Court" (says Lord Hardwicke) "will be conclusive, and bind all." A marriage *per verba de presenti*, therefore, if duly certified by the bishop to be *verum matrimonium*, was necessarily held valid at the common law.

Now, how does this reasoning apply to Mr. Catherwood's case? "In crim. con. and bigamy" (says the learned Baron) "the plaintiff must show a marriage *in fact*; which, we think, is an actual marriage, valid, or voidable and not yet avoided;" and for this he refers to 3 Co. Inst. 88., where my Lord Coke says of the then only statute against bigamy (1 Jac. 1. c. 11.), "This extendeth to a marriage *de facto*, or avoidable by reason of a precontract, or of consanguinity, affinity, or the like; for it is a marriage, in judgment of law, until it be avoided: and therefore, though neither marriage be *de jure*,

yet they are within this statute." Here then Coke plainly distinguishes marriage *de facto* from marriage *de jure*. He does not say, the prosecutor *must* show the former; he merely says the statute *extends* to it, implying that the prosecutor *may* show the latter. Again, he excludes from the term a marriage *de facto*, an "actual marriage valid;" for that is a marriage *de jure*. He means, as we humbly conceive, to say this — in support of an indictment for bigamy, it is not sufficient to show a marriage clearly void, both *de jure* and *de facto* (as for instance with a raving madman); you must show a marriage, which may either be duly proved to the King's Court to be valid *de jure* (by a recorded certificate of the ordinary, or otherwise), or else may appear, on the face of it, to be a marriage *de facto*; for though the latter may be in truth void *ab initio*, in the judgment of the spiritual law (which can alone determine its essential validity), yet in the judgment of the common law, it is a marriage, until it be avoided. Moreover, Coke does not say, that the only marriages *de facto*, which will support the indictment, are those voidable (that is, capable of being *declared* void by the Spiritual Court) by reason of any of the disabilities which Blackstone terms "canonical;" for, consistently with Coke's words, an indictment might be supported by a marriage, which, on the face of it, would appear to a jury to be a marriage *de facto*, and yet, on examination in a Spiritual Court, would be found not to contain such a consent as forms "the substance and indissoluble knot of matrimony;" nor is this unlikely to happen, if "marriages among particular sorts of dissenters" (as Lord Mansfield expresses himself), or "marriages according to any form of religion" (in the words of Buller), may, as against a wrong-doer, be sufficient marriages in fact. We admit that, as a trial for bigamy, and an action for criminal conversation, are both against wrong-doers, it is reasonable to hold, that a marriage, which would not support an indictment, in the one case, would, *à fortiori*, not support an action in the other; but if the House of Lords had authoritatively ruled, in the Queen v. Millis, that a marriage contracted in Ireland subsequently to the statute 58 Geo. 3. c. 81., by a member of the Established Church, without the presence of an episcopally-ordained minister, was incompetent for either

purpose, it does not necessarily follow, that a marriage so contracted in Syria would be equally incompetent, by the common law; and we trust, that we have offered some not inconclusive reasons for holding, that it might be competent.

2. But another point arises from the judgment in the Exchequer, which, we humbly conceive, is entitled to most grave and serious consideration. Were the proceedings in the House of Lords, in *Millis's* case, of such a nature, as to bind the House itself, or any subordinate Court, to the observance of any general rule or doctrine in the law whatever? We ask in no captious spirit, but with most deferential feelings to the high authorities concerned; and with an earnest desire to ascertain the safest and best rules of practice, in the administration of the law.

“It is not in the nature of the minds of men, (says Lord Kenyon,) always to see every part of an intricate argument in the same light.”<sup>1</sup> Therefore, in the opinions of collective tribunals, differences will sometimes arise: and the votes on a given point may be equally divided. In such a case, different systems of procedure have resorted to very different measures. In the civil law, the decision was for the defendant, or for the minor sum, or for the more favourable object.<sup>2</sup> In some tribunals, the president has a casting vote.<sup>3</sup> In some, the number of members is augmented; as in the old afforcement of the assize<sup>4</sup>; or in a commission of adjuncts to the suppressed Court of Delegates, of which a remarkable instance occurred within our recollection. The Court, at the first hearing, being divided 3 and 3, adjuncts were added; it was then divided 4 and 4; afterwards 7 and 7; and at last, a majority of 10 to 5 being obtained, judgment was given.<sup>5</sup> In the Queen’s Bench, when the votes are equally divided, the Judges think it right to state publicly the grounds of their respective opinions, but give no judgment.<sup>6</sup> On writs of error in the Exchequer Chamber or the House of Lords, the course is to affirm the judgment below, on the ground stated in the minutes of

<sup>1</sup> 7 T. R. 580.

<sup>2</sup> Voet. Pand. 42. l. 18.

<sup>3</sup> *Henshaw v. Atkinson*, 1 Lee, 240.

<sup>4</sup> Paulus, D. 42. l. 38.

<sup>5</sup> Bracton, 4. 19.

<sup>6</sup> 7 T. R. ut sup.

the Queen v. Millis. Let us consider, how this ought, in sound reason, to operate on future cases.

The august assembly of the Peerage sits judicially, as a Court of ultimate appeal, the oracle of all subordinate jurisdictions, to ascertain the law, by which they must be governed. But when the House is equally divided, the oracle is dumb. In the particular case, it declines to interfere, and the cause reverts to the inferior jurisdiction, to be there dealt with according to the wisdom of the lower Court. In this there is nothing remarkable; but it would be strange indeed, if, because the House was equally divided, such division should *settle* the law, according to the wisdom of the Court appealed from. In Millis's case the majority of the Court below held the conviction wrong; it might have happened that they had held the conviction right, and then the very same division of the House of Lords, which actually took place, would have settled the law directly contrary to what it is now taken to have done. We ask, with great respect, would such a settlement of the law have bound the House itself? If so, the legal oracle is removed across the Irish Channel: and the Four Courts in Dublin are paramount to the judicial supremacy of the Peerage of the Empire.

The judgment of the Lords (if judgment it must be called) was professedly a mere presumption — "*Præsumitur pro negante.*" Suppose the same point of law raised between other parties to-morrow in the Queen's Bench at Westminster, and there decided by a majority the other way. Upon a new writ of error, there would be presumption against presumption. Must the House of Lords be for ever equally divided? And if so, must it stand like Garrick between Tragedy and Comedy, casting an eye alternately at the two rival benches, and sighing "How happy could I be with either?" Or must it alternately discard the Irish Lucy and the English Polly, according as successive writs of error afforded contrary presumptions, in favour of opposite denials? The subject is too grave for levity. If the affirmation in Millis's case is to have the binding effect ascribed to it, the same rule must be applied to every other equal division of the House, in its judicial capacity; and eventually



the casting vote of a single Irish judge (possibly the least learned of a very learned body,) may give law to the empire, even though it should be contrary to the clear and unanimous opinion of the whole English Bench and Bar.

We are not aware, whether the House itself has ever laid down any rule for its guidance, in a case like that we are contemplating. We know not, that it is precluded, by any positive ordinance, or recognised custom, from examining to-morrow a doubt, which it has been unable to solve to-day; or from disturbing a doctrine, which Irish judges may establish, in opposition to the settled law of their predecessors and contemporaries. But if any such regulation or usage exist, we trust, that some noble and learned peer will bring it under their Lordships' revision; so that it may, at all events, be distinctly known, whether an exact equilibrium of the scales of justice, within the House, amounts to a permanent and irrevocable preponderance beyond its walls.

If it shall eventually appear, that the Court of Exchequer was not bound by the proceedings in the Lords; or that the Lords did not mean to lay down the rule, which the learned Barons understood them to have laid down, the remedy of the party aggrieved is simple. On the other hand, if the judgment in Mr. Catherwood's case be wholly unimpeachable, still, as it professedly related to his marriage, only in the character of a marriage *de facto*, the question of its validity as a marriage *de jure* remains still open, and the legal remedy is to be sought in the Ecclesiastical Court, which always had, and still has, exclusive jurisdiction of the lawfulness of marriage, when not under a statute, and when the question of its lawfulness is directly in issue. In that Court, there are various kinds of procedure, to which the injured gentleman might resort. If, for instance, he should institute a suit for nullity of marriage, it would be to be seen, whether Dr. Lushington or Sir Herbert Jenner Fust would pronounce for the nullity, independently of the law of Syria, which may be laid out of the present argument. To hold it null *de jure*, by the law of England, would, we humbly apprehend, be in direct opposition, not only to Lord Stowell, but to every eminent judge of that Bench, to every author of repute in their Courts, and probably to every opinion, which the learned

Dean of the Arches and Judge of the Consistory themselves ever gave on the point, as counsel at the bar.

Finally, if upon the fullest investigation, it shall be found (contrary to the numerous authorities we have cited) that marriages contracted on or beyond the seas, in places where no local law is known, and where an episcopally-ordained minister is not present, are void, both *de jure* and *de facto*, we can only call, with the greater earnestness, on members of the Legislature to rescue British jurisprudence from so gross an inconsistency; and to give Her Majesty's subjects in such situations, the same freedom, which the statute law of their country secures to them at home.

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#### ART. IX. — LORD WYNFORD.

THE subject of this memoir was too distinguished a man to fear the biographer. It is not our intention to write his panegyric, far less to use unnecessary censure. We shall endeavour, in this brief sketch, to trace the chief incidents of his life, and point out his main characteristics; but in attempting this it will be our duty to bring into view as well the shadows as the lights.

William Draper Best was born in the parish of Hasselbury Plucknett, near Crewkerne, in the county of Somerset, on the 13th of December, 1767. He was of a respectable family of that part of the country: the early name of which, it is said, was Basset. He was well connected on both sides. His mother was the daughter of Sir William Draper, immortalised as the antagonist of "Junius."<sup>1</sup> He commenced his education at Crewkerne school, and was sent to Wadham College, Oxford, at an early age. He was originally designed for the church, and had a view to a fellow-

<sup>1</sup> It is to him that the happy Letter VII. is addressed, which thus commences: — "An academical education has given you an unlimited command over the most beautiful figures of speech. Masks, hatchets, racks, and vipers, dance through your letters in all the mazes of metaphorical confusion."

ship; but succeeding, somewhat unexpectedly, by the death of a cousin, to a competent estate, he abandoned all thoughts of taking orders, and chose the law as his profession. He entered himself at the Middle Temple, was called to the bar in 1789, and selected the Home circuit, where he soon obtained practice, and in 1800 took the rank of serjeant, and in 1806 that of king's serjeant. His name occurs first in the Term Reports, in the case of *Shakespeare v. Peppin*<sup>1</sup>, a case as to the lord's right to approve, in which it is said Lord Kenyon paid him many compliments on his judicious and learned argument. According to those imperishable records, however, the case seems to have been decided rather by the industry of that great judge than by the merits of the advocate.

As a lawyer Mr. Serjeant Best had no great fame,—as an advocate he stood high. He had even enough of law for use in the common occurrences of *nisi prius*, and comparing him with his most distinguished contemporaries, though very inferior in this respect to either Gibbs, or Shepherd, or Law, and also to a less profound though sufficient lawyer, Erskine, he stood greatly above Garrow, who was, on the other hand, a far more eminent advocate. Best had many showy, and some useful and even solid qualifications, purely forensic. His activity was unwearied. He was alive, he was wide awake, at every instant of each case, from the cause being called on to the close of the judge's charge, through the whole of which, when not suffered to interrupt, he was by no means a passive listener, for he would, while reading another brief, keep up an intercourse of dumb show with the gentlemen of the jury. But in the management of the case he never slumbered. Naturally of exceeding quick parts, always well acquainted with his brief, never deeming one cause less important or less interesting than another, he gave his client the satisfaction, to all clients, as to all patients, the most pleasing,—that of feeling that they were in the hands of one who had no other thought in his mind than their case. Hence few advocates of the day were more popular than he. But this was far from being his only qualification to lead.

<sup>1</sup> 6 T. R. 741.

He was a dangerous, because he was a most watchful, and a most enterprising adversary. You could not any more sleep in his neighbourhood than could the Duke while Massena was near, though he might, in the neighbourhood of others, enjoy some repose. But if you never could be sure of his not making some venturous move himself, and were thus kept on the watch, so also you could not venture upon moves in the hope of his eyes being closed. It may almost safely be pronounced, that he never failed to see and to profit by the slip of his adversary; to say that he never, or that he seldom, made slips himself, would be very wide of the truth. In fact, he was not always a safe leader. Circumspect enough to see when his antagonist failed, he took a very narrow, a very one-sided view of his own risks. Bold to rashness, hasty in his resolutions, quick in all his thoughts and all his movements, he was often in dangers wholly needless to be encountered; and though he would occasionally, by desperate courses, escape beyond all calculation from risks both inevitable and of his own seeking, he could not be called a successful advocate. Indeed, so far was this from ever being predicated of him, that with his activity, address, lively manner, good flow of language, happy mode of stating and illustrating, he failed in his purpose more than most men in his eminent position, so that when the fame which he so much enjoyed, and so long retained among clients, led him to some special retainers, Mr. Bolland (afterwards the Baron), hearing surprise expressed at this good fortune, drily remarked, "that he certainly would have had many more, for there were still nearly *thirty* countries where he never had gone."

During his professional career he was exposed to other risks beside those of losing verdicts, and being convicted in the persons of his clients. He was fated to be himself tried for a misdemeanour; and this trouble, for it amounted to no more, he owed to the manly courage, an inherent part of his nature, with which he scorned the attempts of unprincipled persons at extorting money from him by the threats of a prosecution for assaulting a female who had come to consult him at chambers, probably with a view to the further proceedings of her husband. The counsel against him, the late Mr. Cutler Ferguson, though far from having any friendly

feelings towards the Serjeant, always affirmed that the acquittal was most complete.

He was a member of more than one parliament, but never distinguished himself in debate. He acted as one of the managers of the Commons in Lord Melville's case, described by Chief Baron Thompson as "waste of impeachment," which the old judge said he then for the first time saw, though he had often before known "impeachment of waste." It must be admitted, and it was so confessed at the time by the most zealous friends of the proceeding, and the most attentive by-standers in the profession, that the Serjeant excelled all his colleagues in the readiness, the acuteness, and the resources generally which he displayed. The other lawyers were Sir A. Pigott, Attorney-General, and Sir S. Romilly, Solicitor, both Chancery men, with Mr. Giles, Mr. Holland, and Mr. Morris, men of little experience as leaders at *nisi prius*. Sir A. Pigott had been a veteran leader, in former times, on the Home circuit, and was a sound, safe common lawyer, but he wanted the Serjeant's nimble readiness. Sir S. Romilly had also, for many years, been out of common-law practice. Mr. Giles had never been above the rank of a well-employed person before he quitted Westminster Hall, on his father's death, where Mr. Jekyll thought he lingered too long after so great an accession of fortune, and told him, on seeing him make a half-guinea motion, "Dan, you are now worth two hundred thousand pounds ten shillings and sixpence." Mr. Morris was an able and a rising man, soon after made a Master in Chancery by his father-in-law, Lord Erskine. Mr. Holland, a very well-informed and respectable lawyer, had never attained any practice before he entered Parliament. It is not enough to say that, among all these, the Serjeant, a practised *nisi prius* leader, was, without any question, and beyond all comparison, the first; but it must be added, that he showed the greatest ability on any legal argument which arose, and that, by his winning manner, he ingratiated himself with both the peers and the audience, neither of which bodies is apt to be enamoured of lawyers when they bear a part in political contentions.

He entered Parliament as member for Petersfield, and

was a warm supporter of Mr. Fox. He spoke frequently, and often usefully, and was generally willing to undertake motions for committees, or amendments, or, indeed, whatever best suited the Opposition tactics of the day. He did not, however, commit himself to much positive legislation, and his attempts in that direction were not happy. His best effort was in 1804, when he opposed the imposition of stamps on law proceedings. In 1806 he did not so well when he brought in a bill for preventing all interlocutory or ex-parte proceedings from being published in newspapers. He afterwards, however, withdrew the bill. He remained, he said, of the opinion that it was a proper bill; "but, as a great number of persons of high station and character, and for whose judgment upon all subjects I have the greatest respect, seem to think that this measure might, in some degree, trench upon the liberty of the press, and as no man holds the sacred principle in higher estimation and value than I do, I should be the last to do any thing which might be thought to have a tendency to bring it into danger.— Upon these impressions I wish now to give notice that it is not my intention to press the measure any further." If this bill had passed, it would, indeed, have diminished the size of our newspapers, one half of which is frequently taken up with interlocutory proceedings of a criminal nature.

We have said that he voted and acted with Mr. Fox; but the zeal of the patriot began somewhat to cool after having been exposed some years in the dreary regions of opposition, and Serjeant Best is to be added to the (we fear rather long) list of lawyers of easy virtue who have been unable to withstand the approaches of the Court. It is said, indeed, that his resistance was more faint than usual, and that on nearly the first solicitation he surrendered at discretion. His allegiance was to the Prince of Wales, and when he left the Whig party the Serjeant deserted along with him. He soon gained the confidence of many members of the Royal Family, and was highly esteemed by all, and more especially by George the Fourth, William the Fourth, and the present King of Hanover.

Nor did he wait long for that earnest which renders the bargain solid and binding. In 1813 he was appointed attorney-general to the Prince of Wales. In 1818 he

became Chief Justice of Chester, and on the elevation of Mr. Justice Abbott, in the same year, to the Chief Justiceship of England, the vacant puisne judgeship was given to Mr. Serjeant Best.

In that situation he continued until 1824, when, on the death of Lord Gifford, he was made Chief Justice of the Common Pleas, at the express request, it is said, of George the Fourth. In 1829 he resigned this high office, and afterwards, being raised to the peerage by the title of Baron Wynford, gave his attendance occasionally in the House of Lords on appeals, and sometimes in the Privy Council.

Some surprise was occasioned by his receiving a retiring pension on his retirement from the Common Pleas, on the ground of a permanent bodily infirmity disabling him from the due execution of his office, and yet immediately afterwards being created deputy speaker of the House of Lords. On Lord Grey's coming into place in 1830, he ceased to hold this office.

The health of this eminent person was all through his professional life a source of suffering, annoyance, and interruption to his business. He was a martyr to gout; and, besides being occasionally obliged to leave Westminster Hall for Bath, he was for several years, having no time for exercise, and being unable to ride, reduced to the sad necessity of driving from his house to his court in an open carriage, with a beam of wood so fixed as to interrupt the play of the springs, and cause to others unbearable jolting. He was often for weeks together carried out of this machine of torment in men's arms like a child, and placed at the bar and upon the bench.

It is certain that, with many qualifications which were calculated to dispatch the judicial business quickly, and with some of the first requisites of the judicial character, he was upon the whole less eminent on the bench than he had been at the bar. His quickness and his watchfulness were great, his industry exemplary, his freedom from all prejudice, and generally from all partiality, towards the practitioners, as well as from all subjection to their dictation, was commendable. His habits as a leader too enabled him to take large and commanding views of the cases that came before him. But he was, as at the bar, often hasty and rash, nor was he very

patient of contradiction when he happened to be in a pertinacious mood. It was singular how immediately he would take an impression, and as singular how easily he would change it; generally speaking, this was his way; but when the obstinate humour was upon him, he certainly showed extreme hastiness of temper as well as of judgment. These infirmities more than counterbalanced his natural capacities and acquired aptitude for the judicial office. But he often distinguished himself on great occasions; and his display of powers as well as of just and humane feeling in the Slavery case<sup>1</sup>, will long be remembered in the profession; nor are the merits of his oratory lost even in the record of the Term Reports.

The distressing complaint under which he so long suffered, peculiarly irritating to the unhappy patient, not unfrequently led him to display a warmth of manner to the Bar which led to disagreeable collisions. The expressions and ejaculations which then escaped him (but only partially heard) were not always those described by the poet:

“ Desires compos'd, affections ever even,  
Tears that delight, and sighs that waft to Heaven :”

and for a time in the Court of Common Pleas the Bench was placed in that state of constant conflict with the Bar which always ends in the discomfiture of the judge. In the latter portion of his judicial career, however, this manner was greatly corrected. The opinions which he occasionally expressed bordered on the extreme. He approved of boxing, as distinguished from gouging and kicking as practised in some of the northern counties, and so far we should agree with him; but in *Ilott v. Wilkes*, given in Chetwynd's edition of Burn's Justice, he was reported to have defended the use of spring-guns, and to have uttered opinions on the game laws which certainly would not now be tolerated. This called forth a bitter article in the *Edinburgh Review*<sup>2</sup>, written by the Rev. Sidney Smith. Mr. Justice Best, however, took an early opportunity of denying that he used the expression complained of, and declared he had been grossly misrepresented.

When in the House of Lords he was not averse to take

<sup>1</sup> *Forbes v. Cochrane*, 2 B. & C. 448.

<sup>2</sup> Vol. XXXV. p. 123.



upon himself the character of a legislator; and finding the current set in favour of the reform of the law, he launched his shallop on the stream. He brought in two bills in 1830, one for preventing the expense and delay of suits in the common-law courts, and another for preventing debtors from defrauding creditors by lying in prison or absconding from England; but neither of them passed into law. The former bill contained a provision for subjecting parties to an examination on interrogatories for the discovery of facts or documents in question.

His parliamentary exertions were of various and uncertain value, but he never reached the station of either an eloquent speaker or a successful debater. Ever since he entered the House of Lords, he attached himself strongly and continually to the Conservative party, or rather to the portion of that respectable body which professes extreme opinions. In his parliamentary capacity, as at the bar and on the bench, he was thought often of a hasty temper for the moment, yet perfectly good-natured in the main, and never harbouring the least resentment after the contest of the hour was closed.

In the year 1794, he married Mary Ann, second daughter of Jerome Knapp, Esq., a bencher of the Middle Temple, by whom he had several children. He is succeeded in his title by William, his eldest son, the present Lord Wynford.

Lord Wynford died on the 3rd of March last, at his seat in Kent, having reached the good old age of seventy-seven on his last birthday.

## ART. X.—LAW REFORM IN INDIA.

IN some future number we hope to be able to take a review of the progress that has been recently made in India in the reform of the law. The proceedings and labours of the Law Commission, which has now for many years been there established, are well worthy of a separate notice, and the whole subject of the amendment of the law is exciting much attention and interest in that great Dependency. Indeed, nothing has given us greater pleasure, since we have commenced our own humble exertions in this cause, than to find that we have touched a chord which is vibrating throughout every part of our mighty Colonial Empire. We would say this in no boastful or sordid spirit; but it is right that it should be known that, in the short space that has elapsed since the publication of our first number, we have received satisfactory proofs that the desire to amend the law is by no means confined to the mother country. We find, that in directing public attention to law reform, in freely discussing it, and endeavouring to diffuse the truth with respect to it, we are awakening sympathies, and receiving assistance, in a far wider sphere than even we had ever contemplated.

Among the proofs which have reached us of this, we wish to give a brief notice of the answers<sup>1</sup> made to questions propounded by the Indian Law Commissioners to certain of the Judges in the Supreme Courts in India,—of whom, at any rate, it will not be said that they take cramped or narrow-minded views.

Sir Erskine Perry, one of the Judges at Bombay, goes at great length into the expense of proceedings, both at Law and in Equity,—dwelling more especially, so far as the latter is concerned, on the delay at the Master's office, which appears to be no better in Asia than in Europe. To remedy these

<sup>1</sup> These are printed in the Bombay Overland Courier, of March 1st.

evils, Sir Erskine certainly resorts to a sweeping reform. He would, so far as India is concerned, do away with special pleading, and abolish the distinction between Law and Equity. He thus proposes his form of procedure : —

1. All suits shall commence on the personal application of the party to the Judge, on oath if required, and a summons, or *capias*, shall thereupon issue.

2. On summons, &c., being served, the parties shall attend before the Judge in open Court ; and if any matter shall appear to be in dispute, a day shall be fixed for the hearing, and the proceedings in the suit regulated.

3. All evidence shall be given *vivâ voce*, and the parties to the suit shall be examinable on oath at any stage of it ; but, in certain cases, to be regulated by the Judges, the presence of witnesses and parties may be dispensed with, and evidence may be received in a written form.

4. In every case the Court shall decide *on the principles of Law or Equity arising out of the facts*, without reference to the form of suit.

5. All cases shall be decided on the merits, or adjourned till further facts can be procured to enable such decision.

32. I am unwilling to take up the time of the Law Commission by extending this already long paper, with details as to how this system could be made applicable to *all* the civil controversies which come before the Supreme Court, or by pointing out the rules which would have to be framed by the Judges, as to secure —

i. Authentic records of proceedings, when necessary.

ii. The safe conduct of causes which require length of time for investigation.

iii. Application of the machinery of the Court, so as to secure the interest of parties during the progress of the suit.

iv. Arrangements by which the expense and dilatoriness of the Master's office may be avoided.

The learned Judge, at any rate, shows that he is disinterested in these propositions.

34. Having thus given my opinion as to what the practice of the Court ought to be, I am now able, satisfactorily to myself, to answer the queries of the Law Commissioners. It will be seen that, according to the plan proposed, more work is thrown upon the Judges than has hitherto fallen to their lot ; and undoubtedly it enters into my scheme, that one of the Judges should sit at least

four days a week throughout the year. But as I have shown that at present, not one-third of the Judge's time is occupied, and as I can safely say, for myself, that a life of idleness in this country has no charms to recommend it, I do not anticipate any objections on this score.

35. These frequent judicial sittings, however, would dispense with a great portion of the work that is now done out of Court, by the Master, the Prothonotary, the Examiner, and the Clerk of the Small Causes. Whatever judicial business is done by these officers, (and they all, at present, have some to perform,) would be much better done, more cheaply done, and more satisfactorily done, by the Judges in open Court; and what is done by these officers in mere routine business, would be, for the most part, abrogated by the simple procedure proposed. I conceive therefore that these four different offices might be abolished, or rather coalesced into one.

These reforms would, in the opinion of Sir Erskine Perry, render a great diminution and consolidation of offices proper, and possible.

Sir Henry Roper is favourable to some of these changes, but does not give them his entire concurrence.

Sir Lawrence Peel, the Chief Justice of India, in an elaborate paper, combats the opinions expressed by Sir Erskine Perry, but himself proposes a very large measure of reform. He considers that special pleading should be retained; but he thus addresses himself to the important question of abolishing the distinction between Law and Equity:—

The jurisdiction in Equity may be divided into —

1. Purely Equitable.
2. Concurrent.
3. Legal, but administered in Equity.

With respect to the first, where the principles of Equity are ascertained, and have in effect become a species of Law, there is no reason why they should be administered by a separate tribunal, and why they should not be transferred to a Court of Law. Then the anomaly of the same rights being enforced by one tribunal, and defeated by another, would be got rid of; and Courts of Equity would be relieved from a variety of matters, in which they in effect exercise a legal jurisdiction under another name.

Secondly, where the jurisdiction is concurrent, each would in some cases admit of improvement by a mutual transfer of their powers, so as to render each independent of the other. This has

been done in a few instances ; as, for instance, by enabling a Court of Law to issue commissions to examine witnesses, and to entertain questions of interpleader. Another mode in which it might be done, would be by enabling Courts of Equity to try issues ; and at Law to give a discovery, by directing the examination of the parties. If, however, evidence were to be received *vivâ voce* in all cases, on all sides of the Court, this larger improvement would render it unnecessary to introduce the partial amendment before referred to.

Thirdly, where the jurisdiction is Legal, but administered in Equity, as is the case with Account, Administration of Assets, &c., it is of little consequence whether it be retained or not, as the machinery must be retained, whatever be its denomination. This, however, might admit of some simplification. To pursue the above subjects more in detail, under different heads of jurisdiction in Equity : —

*Accident and Mistake.* — Relief on these grounds might be given at Law ; as, for instance, an action on a lost bill of exchange, giving indemnity. This principle has been applied by admitting an action on a lost bond or deed with an excuse for *Profert*. The relief against forfeitures and penalties might also be extended, as in the case of arrears of rent.

Mistakes in instruments might be corrected at Law as in Equity.

*Specific Performance.* — This might, to a considerable extent, be effected at Law. The principle is applied when a verdict for damage is given, reducible upon performance.

There seems to be no objection, upon principle, to the prosecution of an action at law upon an agreement for the purchase of real estate, claiming in the alternative a performance of the agreement, or damages, and to a conditional assessment of damages, with an option in the plaintiff to claim the specific performance. If a question arise as to title, it seems to me that the Court should itself determine the question of title, without any reference to the Master, unless the investigation were one of a protracted character. The examination of parties at law would be the substitute for a discovery in aid of a suit at law, where a ground was laid for a discovery on summary application to the Law Court.

*Trusts* should remain subject to the jurisdiction in Equity. A summary process would in most instances suffice, whether the object were simply an account or the construction of an instrument.

*Dower and Partition.* — The jurisdiction in Equity being grounded on imperfection of powers in Courts of Law, there seems to be no ground for its retention. If retained, however, the pro-

cess should be summary, as it is in partition in the Supreme Court, by one of its rules.

*Account.* — Unless the question involved the execution of a trust, there is no reason why resort should be had to Equity, the machinery on any side of the Court being capable of application on all its sides.

*Infants and Lunatics.* — The jurisdictions should be summary, and, in the latter case, without the expense of a commission, and the Court itself summoning before it all necessary witnesses.

*Summary Jurisdiction.* — The institution of a regular suit is the great expense in Equity, as in the Ecclesiastical Courts. *I think that a summary procedure might in most cases be instituted, as it has in some instances in the Ecclesiastical and Admiralty Courts. It is already exercised in Bankruptcy without inconvenience: it is given by several statutes, as in the case of infant trustees.* By substituting summary proceeding for full proceeding and a regular suit, — by the substitution of *vivâ voce* evidence for written testimony, — by rendering a cross bill unnecessary, by the examination of parties now resorted to, in some instances, after decree, — by adopting, with extensions, the practice, lately introduced at Law, of calling for admissions, — and by other modes of simplification, — the burdensome character of a suit in equity might be destroyed; and the resort to that branch of jurisdiction, when necessary, would not be impeded, if not prevented altogether, by a dread of the expense and protracted litigation, to which an equity suit now gives rise. I will conclude these observations by observing, that for a considerable part, and I doubt not the most valuable part, of those relating to Equity, I am indebted to Sir Henry Seton, between whose views, as to the reform of the system of Equity, and my own, I am glad to observe no material difference.

These opinions, proceeding, as they do, from the Indian Bench, are entitled to considerable respect; and we have thought it right to put our readers in possession of them. Of their peculiar applicability to that country we are not now to inquire. But allowing this, it is needless for us to say, that this by no means proves that the changes here suggested are proper to be introduced into England. Still we hail with great satisfaction the discussion from the Bench of these interesting questions, and rejoice to have lived to see the day when Judges consider it their duty not only to administer the law, but to endeavour to show what that law should be.

## ART. XI.—LORD CHANCELLOR SUGDEN'S NEW CODE OF CHANCERY ORDERS.

### ENGLISH AND IRISH EQUITY PROCEDURE COMPARED.

*The General Orders of the Court of Chancery in Ireland, with practical and explanatory Notes.* By WILLIAM SMITH, Esquire. Dublin, 1843.

THE passing generation has been the first generation since the Commonwealth which has held up legal improvement as an object of national pursuit. It has been an age of earnest desire for judicial reform, and yet of most misdirected effort. The huge accumulation of reports, and (so called) evidence, the crude and undigested heap of blue books of the last twenty years, and the unscientific incongruities and clumsiness of all our great efforts for discovering the hidden truths of the science of judicial procedure, will doubtless be the wonder and laughing-stock of the legal reformers of the next age. And well it may be so. What can be clearer, for instance, than that the first point to be accomplished in improving either law or procedure is to classify and consolidate, or, if you please to call it so, to codify, the statutes or rules in which they are respectively contained? As to the statute law, this perhaps cannot, practically speaking, be done at present. The Legislature is too blind as yet. But as to the rules of procedure, the judges may have it done any day they please. The equity courts of other countries have long since accomplished this end. In New York, the Chancellor is obliged not only to codify the rules of his Court, but to re-enact them every seven years, so that the odium of continuing an injurious regulation shall become personal on himself. In Ireland, the example has now been before us for two years, set by Sir E. Sugden, of one complete code of rules, carefully prepared. Sir E. Sugden has not contented himself with consolidating and arranging the rules of his Court,

and repealing all not re-enacted in his code, but he has introduced many rules, containing most important principles, which as yet law reformers have not been able to get recognised by our judicial legislators here.

In attempting to improve the judicial procedure of any court, the first thing to do is to examine carefully how the analogous proceeding is done—how well it is done—and at what expense of time and money it is done—in every other court; for an analogous proceeding there will be found to be in every other court, from the highest court of the realm to the court of *pie-poudre*. Now this first thing most certainly has not been yet attempted in this country, at least after the way in which a great national object should be attempted. We hope that to some extent the Law Amendment Society may lay a foundation for scientific examinations of this kind. Such examinations we believe can only be well effected by a scientific society; and only there, by the combined contributions of many different members—of men who have been placed in all the different ranks of the profession, and in different courts and different countries. Almost all the great evils of defective legal arrangements will be found to arise from the defective and conflicting systems of legal procedure; and till there is a pretty general concurrence of opinion that the subject of legal procedure is to be *inductively* pursued, like other matters of science, there will certainly be nothing more than hap-hazard advances made towards its improvement. At present we have got no farther than this,—we find something wrong in procedure—we forget that it by no means follows that the high priest must be one of the prophets also, and we say “Our judges, who are our authorities for abstract law, will of course know how to cure it!—Let them set it right!” The judges, who rightly enough, are accustomed to decide the arbitrary matters of law by themselves, and in their own closets, are by no means accustomed to pursue matters of natural science; and do not, therefore, realize to themselves that they must go to work in a totally opposite way to mend procedure; and must call in aid every person who can be found able to bring out facts bearing upon practice, and must put these persons into collision, to test and *elaborate* together the various con-



tributions they have to offer. And so, instead of the old empirical plan of letting any parliament man who was drawing an act affecting abstract law, botch up procedure at the same time, we have taken to another plan, very little less empirical.

We should be evading our duty as honest journalists if we omitted to add that the above is the strong feeling—the *bitter* feeling, we ought to say—of the profession. The profession know a rule of court is but a minor act of parliament, intended to be enacted for the good of the suitors. They know that *they* are the only elected and *trusted* representatives of the suitors. They have been taught to look on the right of petition about projected laws as a first privilege of a free people. They believe that our laws are as good as they are only by the exercise and check of this privilege; and they conceive themselves entitled to as full an opportunity of expressing their minds upon projected court laws as they would have if these were effected immediately, instead of mediately, by bill in parliament. A secret concoction of them they look on as at once both an oligarchical Council-of-Ten principle of government, and as an implied assertion that either they are incapables, whose opinion would be senseless words, or else that they are banded against their own clients, and enemies to all improvement. We regret that our legal legislators do not see that there is some basis for this view of the subject. If they did, they would allow opportunity for, and invite the combined consideration of, the whole profession upon all their projected court laws, before they would ever consent to put their *fiats* upon them.

We propose in the remainder of this paper to do, in a most inefficient way we admit, a little of the work of comparing and weighing conflicting rules of procedure, by stating a few particulars in which the Irish equity procedure, as now established by Sir E. Sugden, differs from and appears superior to our own. The general consolidation of the whole *corpus* of Chancery orders in Ireland we have already mentioned. It is a principle above all praise.

The following three differences between Lord Chancellor Sugden's orders, and those of Lord Cottenham of 1841, from which they are borrowed, are all great improvements.

A notice of a bill, instead of a copy, is served under what is the 23d English order. The saving under this head would often be 30*l.*, 40*l.*, or 50*l.* in a cause. The motion to enter (a parliamentary or *secundum statutum*) appearance is entered in Ireland without a motion to the Court, and order thereupon. A reference to the practice of courts of common law, where any abuse under such practice would be infinitely more mischievous (resulting as it would, in an execution against the goods or person, in two or three weeks), would have led the framers of our English order to have spared the suitor the 8*l.* or 10*l.* he is forced to dissipate in the useless mummery of a motion in our courts.

The 30th English order is very wisely extended so as to enable trustees under *deeds* with powers of sale, &c., to represent *cestui que* trusts, as well as those under wills, as in England.

The *pro confesso* practice in Ireland is most sensible. They have none of our intricate, slippery, dilatory, and persecuting rules of attachment, serjeant-at-arms, &c. &c. When an answer is over-due, a notice of motion is served on the defendant, and thereon an order is made that the bill shall be taken *pro confesso*, if the answer is not put in in a time thereby limited.

The ridiculous rule of requiring all deponents in London to come to Chancery-lane, at any inconvenience, to swear, answer affidavits, &c. &c., (while in the country every solicitor may do it, — and there is not a particle of mischief in the practice); has been vehemently but most ineffectually struggled against here. It was made to secure an income to the Masters. The reason is gone! — the inconvenience has grown with the growth of the “great men,” but the rule is held upon us. All that has been done here has been to open two other oath-shops, *but both in Chancery Lane*, as well as the original shop. In the small city of Dublin a defendant may have his answer sworn by his own commissioner at his own home.

The plan of shewing exhibits, and the rules as to admission of documents (like our common-law rules) as used in the Irish Chancery Court, are of great merit. There is no exception as to married women and infants in these latter orders,

— thanks to the courage of the Irish Lord Chancellor. With such an exception, the rule would have been the play with the part of Hamlet omitted, and a mere mockery.

If any supplemental matter arises before issue joined, it may be added to the bill by amendment? Our readers will see here what a little good sense may do.

The childish or rather monkish system of common injunction is not used. Shall we in England ever be able to let common sense so far prevail as to put an end to the absurd set of fictions and trickery which our common injunction practice must always give rise to? The Irish plan, however, of always requiring a motion to continue the injunction after answers are filed, seems to us a useless cause of expence.

The rule allowing bills to be dismissed for want of prosecution after replication, is very good. That of allowing but one replication to be filed savours rather of the martinet school. What earthly good can come from it? — what mischief is there in the present plan?

One commissioner is appointed instead of two, in the commission to examine witnesses; and there is a power given to exhibit additional interrogatories without the mummary (kept up, we regret to see, in Ireland) of orders of course, or *side-bar* rules, as they call them there.

Minutes of decrees are read in Court before the next cause goes on, as formerly in the English Equity Exchequer. Some of our judges might well adopt this plan. They neglect it. By their neglect, the parties have to come back again to the Court on minutes, and then can hardly get leave to be heard, because they are told they should have had them taken down at the time. Sometimes they are forced to give notice of motion on the subject, so that there may be a greater penalty of costs imposed on them for daring to ask the Court to explain itself distinctly.

Decrees or orders for payment of money into court, &c. are enforced on the first order.

In the Irish Masters' office the arrangements for business are in many respects far better than in ours. The system of hourly warrants is not followed. The Master puts his work into lists, as the Court does here. He has a general list: his

"short line" cases in the morning, and the heavier ones afterwards. He is more trusted than our Masters are. The judges here, seem to consider that a Master can regulate nothing for himself, and they deal with him as an architect does with a builder, laying down a ground-plan and specification, and working drawings for all the minutest details. They are not contented with saying, We want help in this point. Do this for us, and use your wit and intellect as to the method. But they say, Do it by hourly warrants — by warrants to consider — by reports with this recited, that omitted — by this evidence, and not that — by this mode of manipulation, or that mode of manipulation, — which we, in our superior wisdom, prescribe *à priori* — one form for all possible cases. The Irish Masters make, to some extent, their own rules of practice; and they meet once a year to compare rules, and to bring all to a uniform system.

When the report is made, no formal order to confirm it is required. It must be excepted to in due time, or it stands confirmed. How easy would it be to apply this principle to almost all our orders of course.

In the registrars' office a principle of great value is applied, to secure the suitor against delay in preparing and passing orders, &c. There is a solicitor's bespeak-book lying open for inspection, in which every order is entered when bespoken. The exact arrear, and the regular performance of the duty, are thus enforced. The want of stimulus in the officers to exertion, now fees are abolished, imperiously calls for some such arrangement here.

In the accountant-general's office there are many regulations which would be of the utmost value if adopted in England. Above all we would place the duty imposed on him, of investing, as soon as received, all dividends on funds in his hands. The Court orders the dividends to be laid out from time to time, and probably it thinks that is enough, and that the work is done. But not so. The accountant-general requires, from half year to half year, that the solicitor should come and remind him, and pay him. The solicitor does not like doing this. It is a loss to him. If he asks the Court, on any chance petition affording him the opportunity

for repayment of his outlay, he is often told to wait, may be till the minor entitled comes of age. His outlay is doubled or trebled to him by the postponement; and his 6s. 8d. fee, which should compensate him, turned into a valueless reversion. That thousands, almost millions, are lost to the suitors, by this neglect of investment, is obvious from the amount of the suitors' fund, which, in the main, is accumulated through such neglect. What would the Court say to a *trustee* who neglected such a duty? And yet the Court itself, the monster trustee, with other people accurate to affectation, takes the trust money into its own hands, and makes an enormous purse out of its own breaches of trust. Our English accountant-general from half year to half year invested the dividends on the slave-compensation money. Why could he not do it for his more peculiarly legitimate clients, the Chancery suitors? Why does not the Court order him?

There are other regulations as to this office in Ireland worth imitation. That relating to payment of legacy duty by the accountant-general particularly deserves importing into the English court.

The orders about the Irish service office remind us that it was a few years since currently reported that we had narrowly escaped having that bugbear imposed upon us in England. The facility with which Chancery services are now made here, shows how safe we were in acting, in England, on the results of the common-law experience in this matter. The service office is an office Lord Chancellor Sugden may abolish any day he pleases, without the slightest inconvenience to any one, except, perhaps, the officers and porters of the establishment.

We must not omit to mention the important subject of the mode and scale of professional pay. The new common-law principle of discretion to the taxing officer has been to some length adopted in Ireland; and the charge for instructions is generally (within wide limits) a discretionary one. This principle has not been by them, however, yet extended far enough by a great deal. But in English equity costs we have not hitherto been able to obtain the feeblest recognition of it. The taxing officer, on request of both parties, may tax in Ireland without an order of court. This is a most useful and wise regulation. There is no risk of its being abused by

taxation from idle curiosity, which probably would be our fear if we came to consider such a plan here.

These are a few points of diversity between English and Irish practice which have struck us on perusing Sir E. Sugden's valuable code of Irish Orders. The differences were, almost every one of them, at least five years ago, suggested as applicable to England. The annual saving from adopting them might be calculated, by some little labour. It would turn out, in money, to be enormous, and in time and (if we may so say) improved manufacture to be very great indeed. Why should we not have them here? And why is it that we have not got them here?

It is now nearly five years since Mr. Pemberton's memorable speech on Chancery Reform was made, and since the statute 3 & 4 Vict. c. 94, provoked partly by that speech, was passed. That statute gave power to the equity judges to remedy these and all other discernible defects. The defects have been kept continually before the public eye. To compel, we imagine, *early* attention to the subject, Mr. Pemberton procured the powers conferred by that Act to be limited to five years. Those five years expire on the 10th of August next. What has been done? The answer is a melancholy one. What is there in prospect? We are forced to say, nothing which is receiving that wide scientific analysis which we solemnly believe will alone give us a change in procedure worth the name of Reform.

Five years is a large portion of our active life: five years of expectation have now been nearly spent. It is sad, too, to think that a five years' dictatorship *for good* should be so well nigh wasted; that a five years' opportunity offered to the Court of Chancery, to redeem its character and amend its miserable procedure, should have been suffered to creep by; and that the Court should be still, as heretofore, a bye-word for expense, delay, and disappointment; for lavish waste of means to no adequate end;—for noble principles of jurisprudence held up to the longing gaze of the poor in very mockery, and fenced off from the attainment of the rich by almost impracticable and highly absurd procedure;—for hopes deferred, and for sickness of heart.

We will end by begging our readers to ask themselves

how far the satirist's description of the Court, written just twenty years ago, has, from the Court's amendment, become since inapplicable.

A Limbo lying—I wist not where—  
Above or below, in earth or air ;  
For it glimmer'd o'er with a *doubtful* light,  
One couldn't say whether 'twas day or night ;  
And 'twas cross'd by many a mazy track,  
*One didn't know how to get on or back ;*  
And I felt like a needle that's going astray  
(With its *one* eye out) in a bundle of hay ;  
When the Spirit he grinn'd, and whisper'd me,  
“Thou'rt now in the Court of Chancery.”

Around me flitted unnumber'd swarms  
Of shapeless, bodiless, tailless forms,  
(Like bottled-up babes, that grace the room  
Of that worthy knight, Sir Everard Home) —  
*All of them things half kill'd in rearing ;*  
Some were lame—some wanted *hearing* ;  
Some had through half a century run,  
Though they had'nt a leg to stand upon.  
Others, more merry, as just beginning,  
Around, on a *point of law*, were spinning ;  
Or balanced aloft, 'twixt *bill* and *answer*,  
Lead at each end, like a tight-rope dancer.  
Some were so *cross*, that nothing could please 'em ;  
Some gulp'd down *affidavits* to ease 'em ; —  
*All were in motion, yet never a one,*  
*Let it MOVE as it might, could ever move on.*  
“These,” said the Spirit, “you plainly see,  
Are what they call Suits in Chancery.”

## ART. XII. — CHARITABLE TRUSTS.

*A Bill intituled "An Act for securing the due Administration of Charitable Trusts in England and Wales." Ordered to be printed, 7th April, 1845.*

WITH the pagan philosophers the virtue of charity was not considered cardinal. It held no prominent place in the ethical codes of Greece or of Rome. The first who rendered it an object of express municipal encouragement was the converted Emperor Constantine. So, likewise, the original of all mortmain enactments may be referred to his successor Valentinian. Under the superintendence of the unrivalled jurists of the sixth century, this subject soon became an interesting branch of civil jurisprudence. We need not, therefore, be surprised to find that the fundamental principles of the Court of Chancery regarding it, are taken from the Novels of Justinian. Of this the familiar maxim that bequests to pious uses shall be deemed *privileged*, (on the strength of which Lord Eldon reversed a decree of Sir William Grant<sup>1</sup>), is but one, though certainly a remarkable, illustration.

In our own country, the earliest systematic dispensation of charity was by the religious houses,—the convents and monasteries of the Catholic times. These foundations charged themselves peculiarly with the care of the poor; whom they not only relieved, but in fact maintained throughout the island. Hence poor-rates, and overseers, and work houses, were then things undreaded and unknown: for the monks, especially those of the famous Benedictine order, went infinitely beyond the happiest efforts of the Somerset-house Commissioners. In them the characteristic vow of poverty was graced and verified by bounty. Their merit, however, had in it something better than the liberal and constant, but indiscriminate, alms which they doled at their gates. They, indeed, alleviated distress in whatever form it appeared.



But their great distinction, their truest glory, their highest claim to the veneration of posterity, is founded on their schools of education; by which, in barbarous ages, they diffused at once the benefits of knowledge, and the blessings of religion. No wonder then, that, after the lapse of more than three centuries, in spite of misrepresentation and calumny<sup>1</sup>, the memory of these benefactors is still cherished and revered by popular tradition.

We are not now to expatiate on the general consequences which resulted from the suppression of monastic establishments; neither shall we pause to contemplate the foul scramble which took place, when the rapacious Henry distributed his ill-gotten booty. Enough for our present purpose is it to say, that the poor, and those who had none to help them, were among the chief sufferers on that rueful occasion. The dispersion of many thousand wretched beings throughout the country, their miseries, their complaints, their clamours, their importunities, led ultimately to the passing of two well-known enactments, the original poor law act<sup>2</sup>, and the statute of charitable uses<sup>3</sup>; both emanating contemporaneously from the wise government of Queen Elizabeth. With the former of these we have nothing to do here; but the latter demands our first attention, since it, in fact, forms the groundwork of the law of charities administered in England for now upwards of two centuries past.

On examining that statute we find its operation limited to the following objects, namely —

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|---------------------------------------------------|---------------------------|
| 1. For relief of aged, impotent, and poor people. | 6. Houses of correction.  |
| 2. The maintenance of sick and maimed soldiers.   | 7. For repair of bridges. |
| 3. Schools of learning.                           | 8. Of ports and havens.   |
| 4. Free school.                                   | 9. Of causeways.          |
| 5. Scholars in universities.                      | 10. Of churches.          |
|                                                   | 11. Of sea banks.         |
|                                                   | 12. Of highways.          |

<sup>1</sup> The reports of the legal emissaries who were turned loose all over the kingdom, in search of matter to criminate the religious houses, and to justify their subsequent spoliation, are now acknowledged to be one of the most discreditable features which deform the early history of the English Reformation.

<sup>2</sup> 43 Eliz. c. 2.

<sup>3</sup> 43 Eliz. c. 1.

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|---------------------------------------------------|--------------------------------------------------------------------------|
| 13. For education and preferment of orphans.      | 18. For redemption or relief of prisoners or captives.                   |
| 14. For marriage of poor maids.                   | 19. For ease and aid of poor inhabitants concerning payment of fifteens. |
| 15. For supportation and help of young tradesmen. | 20. Setting out of soldiers.                                             |
| 16. Of handicraftsmen.                            | 21. And other taxes.                                                     |
| 17. Of persons decayed.                           |                                                                          |

By the second section it was provided, that the Act should not extend to any college, hall, or house of learning within the Universities of Oxford or Cambridge; or to any cathedral or collegiate churches; or to the colleges of Westminster, Eton, or Winchester; a restriction which has been followed in all subsequent enactments, authorizing general commissions of enquiry into charitable endowments.

The third section provided that the Act should not apply to those cases where, by the directions of the founder, special governors or visitors were appointed to inspect and rectify the trust administration. This exemption was introduced upon the principle, that where the donor himself had prescribed a course of superintendence, the legislature ought not to interfere; a notion specious and plausible, but which we shall see was subsequently, and on the best grounds, abandoned.

Adverting to the quaint recital in the statute of charitable uses, Sir William Grant, M.R., observes with characteristic precision of thought and expression, that "charity, in its widest sense, denotes all the good affections men ought to bear to each other; in its more restricted and common sense, relief to the poor. In neither of these senses is it employed in the Court of Chancery. In that court it means, such charities only as are within the letter and the spirit of the statute of Elizabeth." The law of England, in fact, takes cognizance of no other charities.

During the first year after the statute passed forty-five commissions of charitable uses were issued. From that time to 1643 the returns are defective, the docket books in the Petty Bag Office having been destroyed. From 1643 to the Restoration there were two hundred and ninety-five commissions. No less than three hundred and forty-four were issued between 1660 and 1678. From thence to 1700 there were

one hundred and ninety-seven. From 1700 to 1746 only one hundred and twenty-five, and from 1746 to 1760 no more than three. So that the whole number from 1643 to 1760 was nine hundred and sixty-four. Throughout the long reign of George III. only three commissions were issued; since which period they have fallen into complete desuetude. Many reasons might be assigned for their discontinuance. The simple-minded reader may perhaps imagine that it arose from the greater purity of modern administration. This amiable delusion we must immediately dispel, by assuring him that the trustees of charities within the reach of living memory were about as corrupt and as heedless of their sacred duties as those who have slumbered in their graves for nearly two centuries. We shall institute, therefore, no invidious comparisons. The representatives down, at all events, to the opening of the present century were worthy of their predecessors. But experience soon taught that the cumbrous machinery of commissions of charitable uses were but ill-adapted to the purpose contemplated by the Parliament of Queen Elizabeth. They were utterly inapplicable to charities of small amount, on account of the expense which attended them. And even in the case of large charities, their effect in general was to land the contesting parties in the Court of Chancery: and this by a circuitous process, more tedious than a suit, and less satisfactory. Hence, no doubt, it was that informations in the Court of Chancery, filed by the Attorney-General at the instigation of relators, were resorted to; a species of remedy we rather think unknown (at all events unpractised) at the date of the statute. This method of redress did not come into vogue till the time of Lord Keeper Bridgeman. Its comparative utility became soon apparent. It was consequently countenanced by succeeding judges—especially by Lord Hardwicke—who held the great seal as chancellor for nearly twenty years. Now it will be found (if we are not much mistaken) that in proportion as informations multiplied, commissions of charitable uses became unpopular; and thus were at last thrown aside altogether.<sup>1</sup>

A charity information is a proceeding founded upon this

<sup>1</sup> The last commission of charitable uses was issued in the case of the Kirkby Ravensworth Hospital, 15 Ves. 305., 8 East, 221.

principle, that the Crown, independently of the statute, has an original inherent right, involving also a duty, as *parens patriæ*, to take when necessary into its own hands the care of endowed charities. This high prerogative of general superintendency is exercised through the medium of the chancellor as keeper of the royal conscience. A distinction is therefore recognizable between the authority of the great seal and that of a mere judge in equity; Sir William Grant having observed, "that to the great seal, as superintending all property destined to charitable uses, powers may be supposed to belong beyond those which it would be competent to him sitting in a mere judicial capacity to exercise."<sup>1</sup>

Before consenting to file a charity information, the Attorney-General requires the certificate of a barrister that the case is proper for his interference; he of course also exercises his own judgment; and sometimes hears the parties, their solicitors, or their counsel, before issuing his fiat. He is in truth the real plaintiff in the cause, and has the exclusive government of it in all its stages. He may persevere with it, or abandon it, or compromise it at discretion. And in whatever course he pursues, he is guided entirely by public considerations; consulting neither the interest nor the wishes of his informants, who, however, are retained on the record, that they may be answerable for costs to the defendants, in the event of the suit proving groundless. This proceeding, in one respect, resembles the *actio popularis* of the Roman law; for the parties instituting it need not have the slightest personal concern in the subject-matter of complaint; any persons, however remote in the contemplation of the charity, being entitled, if solvent, to fill the character of relators.

In the year 1786 the great question of *Poor Law* began seriously to agitate the public mind. And, apparently with a view to lay the foundation of some general scheme of amendment and relief, we find that an Act was passed (the 26 Geo. 3. c. 58.) requiring returns upon oath to be made by ministers and parish officers for the guidance of the legislature respecting all such charities as were destined for the benefit of the poor. In a very few years a great body of information

<sup>1</sup> 14 Ves. 334.

was collected, showing an amount of property truly astonishing thus appropriated. For these valuable returns the country was indebted to the active perseverance of Mr. Gilbert, a well-known member of the Lower House at the period in question. They were consequently distinguished by the title of Gilbert's Parliamentary Returns; but not having been printed, nor any abstract made of them, the nation at large remained as much in the dark as before. This we take to have been the reason why several efforts were made from time to time, by well-intentioned persons, to obtain a general registration of charitable donations. On the 26th of March, 1811, Mr. Lockhart, then member for Oxford, laid before the House of Commons a bill for this purpose; on which occasion Sir Samuel Romilly, as we learn from the *Memoirs* of that eminent person<sup>1</sup>, observed, "that he thought the bill would be of little use, for that the countenance of the abuses of charities proceeded from the difficult and expensive nature of the remedy provided by the law, which deterred men from having recourse to it. That the only existing remedy was by information filed by the Attorney-General in the Court of Chancery — a remedy which (in the case of trustees who sought to resist the interposition of the Court by wearing out their opponents) admitted of such expedients of delay and multiplying expense — and that too by those who had the charity funds in their hands — that it was very wonderful that any persons had public spirit enough to become relators, and perseverance enough to prosecute such informations to a final decree. The true remedy for this evil was to enable the Chancellor and the Master of the Rolls to act in a summary way upon petition and affidavits."

In consequence of this suggestion, a bill was brought in and passed in the following year, usually called Sir Samuel Romilly's Act<sup>2</sup> (the 52 Geo. 3. c. 101.), providing that in cases of breaches of charitable trusts, or where the directions of a Court of Equity were deemed necessary for the administration thereof, a remedy might be obtained from the Court of Chancery without resorting to an information, by simply presenting a petition, and supporting the same by affidavit or

<sup>1</sup> Vol. II. p. 379.

<sup>2</sup> It was in fact drawn by him.

other evidence — a course of proceeding infinitely more simple and less expensive than that formerly in use, but not free from objections of a serious kind, which seem scarcely to have occurred to the experienced mind of the author of the measure.<sup>1</sup>

It was, we think, in the year 1816, that Lord Brougham first turned his mind to the subject of this article — an era fortunate and memorable in the history of charities. By the suggestion of the “Education Committee,” of which he was chairman, and which commenced its important labours at the period we are speaking of, the House of Commons ordered that an abstract should be prepared of Mr. Gilbert’s Returns, and that the same, arranged in a tabular form, should be printed. A document, consequently, soon made its appearance, which proved of unspeakable assistance in all the subsequent inquiries. The Committee of Education was revived in 1817, and again in 1818. Its proceedings are stated to have been resisted not only by the government of the day, but by all the colleges and public schools in the kingdom, by their numerous supporters in the Church and in the State, by members of both Houses of Parliament, and by almost every member of the aristocracy of what party soever; each and all vying one with another in zeal to protect time-honored abuses, and to stifle irreverent investigation. Nevertheless, such was the perseverance of the Committee, and such the importance of the disclosures which they brought to light, that the minister, Lord Castlereagh, at last brought in a bill to authorise the issuing of a commission of inquiry; which bill passed into a law on the 10th of June, 1818. The measure thus wrung from the reluctant concession of the Government was limited to charities connected with the education of the poor. In imitation of the original statute of charitable uses<sup>2</sup>, it exempted from inquiry the two Universities; the colleges of Westminster, Eton, and Winchester; as well as all cathedral or collegiate churches; and it gave for the first time a similar protection to the Charter House, Harrow, and Rugby. It also restrained the commissioners

<sup>1</sup> *Corporation of Ludlow v. Greenhouse*, Dom. Proc. 1827. See Lord Redesdale on Pleading, p. 18.; see also 2 Vcs. & B. 134.; Coop. Cha. Ca. p. 295.

<sup>2</sup> 43 Eliz. c. 4.

from meddling with any charity which might appear to have special visitors assigned to them by appointment of the founder.

We must observe, however, that in one material respect this act departed from the Elizabethan model; for it extended the exemption from inquiry to "all schools or other endowments, of which the universities or colleges were trustees;" an expansion of the original exception, which furnishes an expressive commentary on the spirit in which the act was conceived.

There was much in this act to disappoint the expectations of those who ardently sought a general and comprehensive examination of charity abuses. In the month of August, 1818, Lord Brougham published his celebrated letter to Sir Samuel Romilly<sup>1</sup>; in which, besides innumerable other defects pointed out in the act, it was stated that the commissioners "were not to examine abuses of all charities, but only of those connected with the education of the poor, although every one was aware how many malversations existed in charitable institutions wholly unconnected with education; and it was obviously a more natural as well as a more economical course of proceeding to authorise the commissioners to look into these at the same time that they were examining the others, than to set one set of functionaries to investigate school charities, and then despatch a second body to go over the same ground in order to see what the former had been ordered to overlook." Again, in this remarkable production, it was observed that even among charities connected with education there was introduced by the act a large class of exceptions, comprehending not only the Universities and the public schools down to Rugby, "but generally all charities having special visitors, governors, or overseers." Now it happened that almost every considerable charity was subject to special visitation; consequently, what remained for the operations of the commissioners lay within a sufficiently narrow compass. The probability of abuses existing in any charity was by no means diminished by the circumstance of a special visitor having been appointed. In

<sup>1</sup> This letter ran through eight editions in the month of its publication.

general, the visitor resides at a distance; he is most commonly an official person, with other duties to engage him, as the bishop of the diocese, or the head of a house, or at one of the universities: he is usually directed to visit once in so many years; and if no term is specified, he is only by law obliged to visit once every third year. Above all, the exemption in the statute of Elizabeth had increased the probability of mismanagement in such charities by preventing them from ever being examined by a commission of charitable uses; while a great proportion of the other charities have undergone this investigation once or twice since their foundation."

These arguments with many others, in which the pamphlet abounded, created such a sensation among all classes, that in the beginning of the ensuing session, 1819, Lord Castlereagh announced another bill, extending the former act, and enabling the commissioners to examine all charities, whether connected with education or not, but still retaining the absurd exemption as to special visitation, as well as continuing the protection to the Universities, the cathedral and collegiate churches, and the public schools which have been specified. This bill soon passed into law<sup>1</sup> and certainly was a great improvement upon its predecessor, as will appear to any one who chooses to reflect but for a moment on the vast amount of property consecrated to charitable purposes, although utterly unconnected with education. In the same session another act was passed, the 59 Geo. 3. c. 91., which authorised the Attorney-General, on a certificate from the Charity Commissioners, to institute proceedings in Equity by information or petition, without the intervention of relators, in all cases of charitable trusts where such interposition might appear expedient.<sup>2</sup> In 1831, another commission was issued in pursuance of the 2 & 3 Will. 4. c. 34.; and here, as might have been expected from the individual then at the head of the law, an end was put to the noxious exclusion of the visited charities from investigation. But the Universities, the cathedral and collegiate churches, and the public schools were still, as before, protected from inquiry. In 1835, a

<sup>1</sup> 59 Geo. 3. c. 81.

<sup>2</sup> This act was continued and extended by 2 Will. 4. c. 57., and the authority thereby given was acted upon till the final close of the inquiry in 1837.



select committee of the House of Commons reported, that, by issuing another commission, and increasing the number of commissioners, the whole inquiry might be brought to a close on the 1st of March, 1837. The committee therefore recommended that this should forthwith be done; and they also gave their opinion that it would afterwards be desirable to establish a permanent Board at Westminster for the continual superintendence and control of charities. This report was so far acted upon by the Government, that they issued a commission conformably to its suggestion; and the result was, that, by the end of 1837, nearly twenty years from the commencement of the inquiry, every charity, great and small, falling within the range of the commissioners' authority, was investigated and reported upon to Parliament. Thirty-eight ponderous folio volumes record the labours of those industrious persons whose services have cost the country 255,570*l.*, independently of the expense of printing their reports. The number of charities thus registered is 28,840; the whole yielding an annual revenue of 1,209,395*l.* 12*s.* 9*d.*; a sum, the amount of which may at first stagger credibility, but which is well known to fall greatly short of what might reasonably be expected to arise from the charities of the kingdom if all of them were managed with ordinary prudence and integrity. In the opinion of those who are best qualified to judge, the aggregate income derivable from a judicious administration of these trusts would, probably, not be less than a million and a half per annum<sup>1</sup>; an amount, the magnitude of which becomes still more surprising, when we

<sup>1</sup> To show that the returns are not calculated to exhibit the actual yearly value of charity property, we may refer to the case of the Meer Hospital, in the county of Lincoln, the revenue of which is represented at 32*l.* a year. Yet that hospital has an estate of nearly 900 acres, within four miles of Lincoln, worth probably not less than 1500*l.* a year. We may remark, in passing, that the abuse of this charity was perhaps the most flagrant instance on record of that species of enormity. The warden of the charity defended himself by alleging that his place was an ecclesiastical benefice. He pocketed all the revenues which he derived from fines, except 32*l.* a year, which he paid in equal shares to six poor men. The case was examined by Mr. Macqueen, one of the Charity Commissioners in 1836, and was certified to the Attorney-General, who filed an information; upon the hearing of which, Lord Langdale pronounced a decree at the Rolls, on the 23d November, 1841, ordering the warden to make good to the charity no less a sum than between 22,000*l.* and 23,000*l.*

remember the great proportion of charities which, as we have already shown, were entirely excluded from inquiry.

We are now arrived at the last instance of legislative interposition respecting charities, the 3 & 4 Vict. c. 77., an Act "for improving the condition and extending the benefits of Grammar Schools." Few of our readers require to be told, that the word "grammar" has been interpreted by Courts of Equity to mean the Greek and Latin languages. Hence, acting upon this construction, many endowed schools, both of royal and private foundation, have limited their instructions exclusively to the classics; to the great disappointment of parties, who, conceiving themselves to be within the intent of the donor's benefaction, seek in vain in such establishments for the benefits of elemental or commercial education. Sir Eardley Wilmot, therefore, the originator of the statute to which we are now directing attention, conferred an acceptable and grateful boon on a large section of the community when he induced the Legislature to pass a measure which enables Courts of Equity to extend the system of education pursued in grammar schools to other useful branches of literature and science.

We have thus endeavoured to give a brief sketch of the history of charities, including an outline of the legislative and judicial remedies which from time to time have been employed to enforce their correct administration. We are next, under the direction of a skilful guide, to enquire, What remains still to be done in order to place these endowments on a satisfactory footing for the future? On this subject we shall quote some passages from a valuable pamphlet published by Mr. Hine in 1842. That gentleman, who was secretary under the last two commissions, and whose long experience gives his opinions the greatest weight, observes that

"The most general and prominent evil by which charities are affected is, the want of an easy and inexpensive mode of keeping up the succession of trustees. The instrument of foundation often omits to make provision for such succession; and when it does make it, and the donor has empowered a given number of surviving trustees to nominate others to fill up the trust, the nomination is generally deferred till the prescribed number of trustees no longer exists; when, if an appointment is made, it is invalid; but

more commonly no appointment is made at all. This occurs either through inadvertence, or because the funds of the charities are too small to bear the expense of a conveyance or transfer to the new trustees.

"Rent charges are especially subject to this evil; the consequence is, that these are at the mercy of the owner of the property out of which they issue, who may withhold the payment with impunity.

"Charities, whose endowments consist of land or houses, suffer greatly by a want of legally constituted trustees. Portions of the property are often usurped with impunity by tenants, who have been long in occupation, or their descendants. And where masters of schools have been allowed to occupy the charity property, the families of the masters have, after their deaths, claimed it as their own.

"Those charities, whose incomes arise from stock in the public funds, are exposed to much inconvenience, and ultimately to loss. The general rules of the Bank of England do not allow stock to stand in more than four names, so that, generally, new appointments of trustees are required at shorter intervals than when the number of trustees is three or four times as great. As the Bank does not allow stock to be designated in their books as belonging to any trust, it appears to be the property of the individuals in whose names it stands, and consequently there are no means of guarding against its embezzlement.

"When the Court of Chancery is resorted to, to effect the appointment of trustees, the expense of the proceeding, including that of a conveyance to them, can hardly be estimated at less than 50*l.* or 60*l.*, even in a simple case, and one where the defect of trustees is of recent origin; but when no appointment has taken place, perhaps, for a century, the expense may be immeasurably augmented. In such a case, the attempt to discover and prove the respective periods of the deaths of ten or twelve trustees, in order to ascertain which of them was the survivor, may be attended with great labour and difficulty; it may be impossible to arrive at certainty, and not a little must be left to be supplied by inference and conjecture. The next step is for the master to advertise in *The Gazette*, and other papers, for persons claiming to be heirs of the survivor, to come before him and make out their relationship.

"If no claim is made or established the master is authorised to name any one he thinks fit to make a conveyance, which, under a modern statute, is as valid as if executed by the real heir."

Besides the embarrassment and injury occasioned by the want of trustees, there is another source of mischief, the

impossibility of removing such as are incapacitated by age or other causes from the performance of their duties.

The dangers to which Charity Funds are exposed by being left standing out on inadequate security are well explained by Mr. Hine.

“The want of an authority to enforce a due investment of pecuniary funds, has led to numberless losses. Charity funds, when deposited in the hands of individuals, are found, in process of time, from the ordinary changes of human affairs, wholly to disappear; whether the depositories chosen have been the heads of opulent families, the successive incumbents of parishes, or other persons of the most respectable or distinguished station. Very little reflection can be necessary to convince any one that losses from this cause are, sooner or later, almost inevitable. Notices of them abound in the reports of the commissioners. The inducement of high interest has often led to the advance of charity money for parish purposes of an extraordinary nature, such as extensive repairs of a church or building, or enlarging a work-house, on an engagement, ratified perhaps by a resolution of vestry, to pay the interest, and ultimately replace the principal out of the parish rates. This has often been done without any unfair intentions; but the payment of interest has been kept up only till it was objected to, and it was then discovered that, as future rates could not be pledged for sums which ought to have been raised when the expenses were required to be incurred, there was no available security for either principal or interest.”

A permanent superintending board then, such as that recommended by the select committee of 1835, is to be regarded, not as merely expedient, but as positively indispensable. The Government, we are happy to see, are of this opinion; for, as these sheets pass through the press, the lord chancellor has brought in a bill by which it is proposed to appoint commissioners for the control and superintendence of charitable trusts. On these commissioners important powers are to be conferred, — to enable them to give authority for sales, exchanges, and leases of charity property — empowering them to remove trustees, and to appoint their successors; to settle schemes; to compromise claims; to inquire into the receipt and application of charity revenues; to inspect accounts and vouchers; to examine witnesses upon oath; to order transfers of stock; to call in

moneys defectively secured, &c. The eleventh section gives effect to a principle long advocated by those who have had at heart the amendment of the law of real property. It enacts that estates shall vest in the trustees to be appointed under the act by virtue of the appointment alone, without any instrument of conveyance. To this extent we bestow on the bill our entire, unqualified approbation. A part of the plan is to appoint "two fit persons" to be "inspectors" for the purposes of the act. We have misgivings as to these functionaries. We doubt much whether there will be work for them. We should greatly prefer occasional auxiliaries in the shape of assistant commissioners, to be paid by the day. Their duties would be professional, and often delicate and important. No man, we venture to assert, competent to perform those duties adequately, would consent wholly to abandon his proper avocations for an appointment of the stamp here contemplated. There is another defect in the bill; it limits the jurisdiction of the Board to cases where the property of the charity does not exceed 50*l.* a year of income, or 1,200*l.* in value. We cannot help suspecting that this restriction has been introduced *per incuriam*. It seems absurd to erect a Board for so insignificant a purpose. We should humbly advise that the jurisdiction of the commissioners should be increased; and that parties conceiving themselves aggrieved by their decisions should (subject to certain qualifications and restrictions as to amount and value) have the benefit of an appeal to the Court of Chancery. This would operate as a salutary check on the Board, and would make it safe to extend the scope of their authority. We are anxious that the lord chancellor's mind should be drawn to these points. Again, we must observe that while the bill gives ample power for the removal of trustees, and for the substitution of others in their places, it nowhere gives authority to fill up mere vacancies; an omission the more extraordinary, since it is one of the first things that ought to have been provided for by the bill. These blemishes, however, may be easily corrected. The measure, we repeat, though long deferred, is creditable to the Government, and will give satisfaction to the country.

# SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST FEBRUARY, 1845.

| COURTS.                      | REPORTERS.                                         |
|------------------------------|----------------------------------------------------|
| House of Lords - - -         | Clarke & Finnely. Vol. 11. part 1.                 |
| Privy Council - - -          | Moore.                                             |
| Lord Chancellor - - -        | Phillipps.                                         |
| Rolls - - -                  | Beavan. Vol. 6. part 3.                            |
| V. C. of England - - -       | Simons. Vol. 13. part 1.                           |
| V. C. Knight Bruce - - -     | Collyer. Vol. 1. part 2.                           |
| V. C. Wigram - - -           | Hare. Vol. 3. part 4.                              |
| Court of Review - - -        | Montagu, Deacon, & DeGex.                          |
| Queen's Bench - - -          | Adolphus & Ellis. Vol. 4. part 3.                  |
|                              | Davison & Merivale. Vol. 1. part 2.                |
| Common Pleas - - -           | Manning & Granger. Vol. 5. part 5.                 |
|                              | Scott. Vol. 6. part 1.                             |
| Exchequer - - -              | Meeson & Welsby. Vol. 12. part 5. Vol. 13. part 1. |
| Practice Cases - - -         | Dowling & Lowndes. Vol. 2. part 2.                 |
| Ecclesiastical - - -         | Curties.                                           |
| Admiralty - - -              | Robinson.                                          |
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THE SUSSEX PEERAGE. 11 Cla. & Fin. 85.

*Royal Marriage Act. — Evidence of Foreign Law.*

The proceedings of the Lords' Committees for Privileges on Questions of Peerage, under references from the Crown, being

strictly judicial, the points decided in this case are of legal authority. It will be remembered that the petition of Colonel D'Este, son of the late Duke of Sussex, claiming the peerage dignities of his father, was disposed of by the House of Lords in the last session of parliament. The sole question was, whether a valid marriage had been contracted between His Royal Highness and the Lady Augusta Murray, regard being had to the provisions of the 12 Geo. 3. c. 11., which enacts that no descendant of George II. shall be capable of contracting matrimony without the previous consent of the person on the throne. The facts shortly stated were these:—In the year 1793 a ceremony of marriage was celebrated at Rome between the parties by a clergyman of the Church of England (the Rev. Mr. Gunn), in a form as nearly as could be according to the rites of that establishment; in other words, the requirements of Lord Hardwicke's Marriage Act, the 26 Geo. 2. s. 33., were, as far as possible under the circumstances, complied with. And although it was admitted that the Royal Marriage Act would have annulled it had it been contracted in England, the question was, whether the same consequence attached in the case of a contract celebrated and consummated beyond the realm. Upon this point the Queen's judges were ordered to advise the committee; and, having taken time to consider, came ultimately to a unanimous opinion, delivered by the Chief Justice of the Common Pleas, that the prohibitory words of the act were general, namely, "that no one of the persons therein described should be capable of contracting matrimony." This, they held, was an abstract, unlimited interdiction, constituting in the Duke an incapacity, which he carried with him wherever he went, and which was consequently as operative and as insuperable in Italy as in this country. The marriage, therefore, was clearly bad; and to this the Committee for Privileges assented, and resolved accordingly. Such is a brief account of this determination. A point, however, arose in the law of evidence, to which attention may usefully be directed.

It having been considered important for the claimant to show that, by the *lex loci contractus*, his marriage was good, a witness was produced to prove the existing law of Rome on the point. That witness was the learned and well-known Dr. Wiseman, who, upon examination, stated himself to be a Roman Catholic bishop, "and coadjutor to the bishop who is Vicar Apostolic to the central district of England at present." His evidence was objected to by the Attorney-General, on the ground that he was not a professional lawyer, nor had he any peculiar means of knowledge to render him admissible in the character of a skilled witness, competent to

prove foreign law as matter of fact. The claimant's counsel, therefore, proceeded to *qualify* the witness by examining him as to his position and attainments. The doctor stated:—"I have had no personal experience of the administration of the law at Rome. I have studied the canon law. I have not gone through a regular course of it; but, for the discharge of my duties, it has been necessary that I should make myself acquainted with the canon law on all points on which it applies to matrimonial cases. I have gone through the studies usual for ecclesiastics, but not for ecclesiastical lawyers. I have not gone through such a course of study as would qualify me to be a judge in the ecclesiastical tribunals. I have no means of knowing the law on this subject more than any other learned ecclesiastic. I have been appointed an ecclesiastical judge in this country by the court at Rome, as any other bishop or vicar-general might be. All that relates to matrimonial cases would come, of course, before me in my present office, and I should dispose of them by the canon law of Rome. It would be my duty to decide with respect to them. My decision would be of authority till reversed. I have frequently, during my residence in England, exercised this jurisdiction. I have authority to determine whether a marriage between two Catholics is or is not valid. The tribunals at Rome would respect my decisions, and act upon them. My jurisdiction is entirely confined to spiritual censures and to consequences of an ecclesiastical character, not affecting property or civil rights." Upon this the Lords determined that the witness came within the description of a person learned *virtute officii*, and that his evidence was therefore admissible.<sup>1</sup> It was accordingly received; and, as we well remember, was exceedingly curious and instructive, showing how far the present law of Rome and of other Catholic countries recognises the validity of marriages contracted there by Protestants. In particular the learned doctor held that

<sup>1</sup> In course of the argument reference was had to a case decided by Mr. Justice Wightman at *Nisi Prius*, — *Reg. v. Dent*, 1 Car. & Kir. 97., where it appears to have been held that a witness called to prove foreign law need not be at all connected with the legal profession. The question turned on the law of Scotland as to marriage. To prove it, a person was put in the box whose knowledge was stated by himself to be founded merely on these facts, namely, that he was born and educated in Scotland, where he had resided till he was twenty years of age. He, however, asserted himself to be acquainted with Scotch law; and the learned judge admitted his evidence. Adverting, however, to this decision, the Lord Chancellor took occasion, in the *Sussex Peerage* case, to say, that it was the "universal opinion both of the judges and the lords that the case represented to have been decided by Mr. Justice Wightman was not law." The witness must therefore either belong to the legal profession, or be (like Dr. Wiseman) *peritus virtute officii*.



the marriage of the Prince and Lady Augusta would, under the circumstances, have been considered valid by the Italian lawyers. But all this is strangely omitted in the report. We recommend that it be inserted in Messrs. Clarke and Finnelly's next number; and we would further take the liberty of suggesting to these learned gentlemen that in reporting evidence given by witnesses *vivâ voce* (especially when proving a matter of science) it is not expedient to adhere too literally to the order (or rather want of order) in which answers are extracted by counsel from the party undergoing examination. In a Law Report, we submit that the substance and effect of what is said is all that is required; and *that*, we humbly think, should be given logically, and not in the random way in which it may chance to fall from the lips of the witness. A little attention to what we are now throwing out would have enabled the reporters to comprise in one page matter that in the report extends over thirteen.

HALL v. PALMER. 3 Hare, 532.

*Immoral Consideration.*

A party had bound himself by bond to secure an annuity to a woman with whom he had long cohabited, the payment to commence from the death of the obligor. This bond was prepared by his solicitors, to whom he said, in reply to a question put to him by one of them, that he still maintained his connexion with the woman, and that it was not his intention to discontinue it. The evidence also showed that it was not broken off. Such being the case, the bond was left in the possession of these solicitors till the death of the obligor, against whose executor the woman filed a bill for payment of her annuity. The demand was resisted by the executor, who contended that the fact of placing the bond in the hands of his own men of business showed that the obligor had intended to keep it under his control; so that it was fairly to be inferred that future cohabitation constituted an element in the consideration of the bond; and if so, it was not obligatory. Vice Chancellor Wigram, in disposing of the case, observed that, "it was true that a bond given in consideration, either in the whole or in part, of future cohabitation, was void; but from the evidence here, he concluded that the bond was given in performance of what the obligor was informed he was under a moral obligation to do, and that the suggestion of *turpis contractus* was not sustained. The onus lay on those who disputed the validity of the bond to prove that the consideration was bad. He could not distinguish this case from that of *Gray v. Mathias* (5 Ves. 286.), where such a bond was held

valid. In that case, as in this, the intercourse between the obligor and the obligee did in fact continue. In the present case it appeared from the evidence that, although the bond was given in consideration of past cohabitation, yet the obligor at the time stated that he had no intention of breaking off the connexion. The reasonable construction of that language was that he meant to maintain the woman in a manner not unlawful." The validity of the bond, therefore, is sustained by the Vice Chancellor on the ground that it was for past cohabitation; and so far there is nothing novel or very important in the determination.

But when Vice Chancellor Wigram throws out the suggestion, perhaps not necessary for the purposes of his decision, that the obligor, in speaking of the continuance of the connexion, must be supposed to mean "in a manner not unlawful," we incline to suspect that most people would draw the very opposite conclusion from the circumstances of the case. The presumption of the ecclesiastical courts would, we believe, be directly the other way. They would hold — and we believe the bulk of mankind would agree with them — that an improper connexion continued, must necessarily mean continued improperly.

MILLER v. CRAIG. 6 Beav. 433.

PRITT v. CLAY. 6 Beav. 503.

*General Release — how considered in Equity.*

A general release, without particular recitals, however conclusive by way of plea at law, is not so regarded in courts of equity. Those courts require the releasee to prove that every transaction to which he desires to extend the application of a release was present to the mind of the releasor at the time of the execution of the release, or had been previously called to his attention with reference to such release. Full recitals, therefore, are absolutely necessary to the finality and efficacy of a general release. In *Cole v. Gibson*<sup>1</sup>, Lord Hardwicke said, "it was common in equity to restrain a general release to what was under consideration at the time of giving it." Again, in a later case of *Ramsden v. Hylton*<sup>2</sup>, his Lordship said, "It is certain, that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited which was under the contemplation of the parties, and intended to be released. — It is impossible to imply within the general release that which neither party could have had under consideration." In

<sup>1</sup> 1 Ves. Sen. 503.

<sup>2</sup> 2 Ves. Sen. 305. 310.

*Lindo v. Lindo*<sup>1</sup>, a release, though unlimited in its terms, was held from the recitals and context to operate only as to a particular sum mentioned in the recitals. The foregoing principles seem pertinent to the decision in the recent case of *Millar v. Craig*. There, an account of partnership dealings and transactions was settled; and in 1823 releases were executed between the plaintiffs, the residuary legatees of one partner, and the representatives of the other partner, who died at a later date. The releases had exclusive reference to the partnership affairs, which were recited. In consequence of the proof of numerous errors, Lord Langdale, M. R., set aside the release given by the plaintiffs; but, having regard to the lapse of time, and the loss of books and documents, his Lordship refused to open the accounts generally, and merely gave leave to surcharge and falsify. His Lordship said, "Very numerous and important errors have been proved in this case. I cannot help saying, that I do not recollect any case in which errors of such an amount and number have met with so faint an answer as has been given in this case. Errors have been distinctly proved, but it is not necessary that I should observe upon them; for, unless the release is to cover all the errors detected in the accounts, the accounts, in some way or other, must be reconsidered. Beyond all doubt, the plaintiffs, who were in Scotland, never had an opportunity of examining those accounts. "Looking at all that has taken place between these parties, what reason is there to think that the plaintiffs had any means whatever of examining the accounts, or that they signed the release, except upon the mere confidence that these accounts had been truly and properly stated? This would entirely preclude the argument, that these parties must be considered as having settled each and every disputed item, for the purpose of coming to an agreement, arrangement, or compromise. This release was signed in confidence: it was signed in the belief that these accounts had been truly stated. Seeing that the release was obtained under such circumstances, I cannot think it is consistent with justice to say, that because a considerable length of time has elapsed, before these parties, resident in a remote part of the United Kingdom, discovered the errors, the account is for that reason to stand." The subsequent case of *Pritt v. Clay* proceeded upon an exactly similar principle. *Pritt and Clay*<sup>2</sup> were in partnership as solicitors. *Pritt* died; and his representatives filed a bill in this court against *Clay*, for the purpose of having the partnership accounts taken. The defendant by his answer rendered the accounts, but by an error, arising from ignorance of fact, omitted a claim which

<sup>1</sup> 1 Beav. 496.<sup>2</sup> 6 Beav. 503.

the firm had against a railway company. Upon the footing of this account, the suit was compromised, and the defendant agreed to pay 500*l.*, in full compromise, satisfaction, and discharge of and from all differences, claims, and demands. On payment of this sum, mutual releases were executed, and the bill was dismissed, by consent, without costs. The railway company subsequently demanded their bill of costs for business done by the firm; and then Clay, to his surprise, discovered that Pritt, who had principally attended to the accounts of the firm, had omitted from the railway company's bills costs to the amount of 1998*l.* Clay received this sum from the company; and then Pritt's representatives filed a new bill, claiming a participation in the money thus recovered; and Lord Langdale, M. R., decided in their favour, holding that this item had been omitted from the accounts by a common error.

NELTHORPE *v.* HOLGATE. 1 Coll. 203.

*Specific Performance. — Concealment. — Jurisdiction.*

Though the functions of equity jurisprudence are not limited to the protection of rights, but extend also to the enforcement of duties, the Courts nevertheless refuse to take cognisance of a large class of duties, to which certain moralists have not unaptly attached the title of imperfect obligations. So that, unless their non-observance be coupled with some default, violating the fundamental rules of forensic justice, the tribunals of equity, as well as those of law alike decline to interfere. With this short preface, we introduce a case, the facts of which, briefly stated, were, that one Holgate sold an estate in Lincolnshire to a person named Holmes, who did not enter into the contract on his own account, but on behalf of Sir John Nelthorpe, with whom he had made an agreement for a resale, on the terms of his purchase from Holgate — this latter circumstance, however, being carefully concealed from the original vendor; the object being to enable Sir John to acquire the property on more favourable terms than might be expected by dealing directly with Holgate, whose land adjoined and lay convenient to the bulk of the Baronet's estates. Upon a Bill being filed against Holgate, he resisted specific performance, on the ground of this latent agreement. It was not alleged that Holmes had been guilty of any misrepresentation; but Holgate contended that the concealment of the sub-contract was a tacit deception, which vitiated the principal contract. It may be noticed, that Holgate's answer contained no averment, nor did he give any evidence, of Holmes or Nelthorpe, or their solicitors having asserted, in answer to any question on Holgate's part, that Holmes was not acting as an agent

or trustee. The answer, likewise, contained no suggestion that Holgate had even refused, or declined, or expressed, or felt, any disinclination to sell to Nelthorpe; or that Holgate, if he had known Nelthorpe to be the real purchaser, would have refused or objected to deal with him; or that Holgate, if he had known the real circumstances, would have obtained better terms from Nelthorpe.

*Vice-Chancellor Knight Bruce.* — “By the law of this country, as administered in every court of Westminster Hall, the mere act of contracting with another in the name of an agent, that agent making himself liable, and not disclosing that he does not in truth contract on his own behalf, is not forbidden, but may effectually take place. If this right be exercised from a belief, well or ill founded, that, were the real relation between the agent and his principal known, the other party would, from mere caprice, or unreasonably, or from a bad motive, decline to contract, or would use the knowledge for the purpose of extortion, that can make no difference. Nor is the rule one that must be sought in the recesses of the law, familiar only to its professors. It is, on the contrary, one trite and popular, lying in the common track of ordinary life, under the daily observation of all classes of men. Why then, it may be asked, — if Mr. Holgate deemed the question, for whom Holmes was contracting with him, one of any importance, — if he thought it a matter of consequence whether the estate that he proposed to alienate was to be enjoyed by this or that man, — if it was an interesting point to be satisfied from what purse the money to be paid to him was to proceed, — or if he considered one man likely to be more malleable or flexible, more liable to pressure, or less cool in the operation of a bargain than another, and that this might be fairly made a source of gain, — was not a question asked by him or Mr. Owston (his solicitor) of Mr. Holmes or his solicitor, the answer to which, if false, might possibly have given a defence against the contract; if true, or evasive, might possibly have stopped the progress of the transaction? No such question was asked; and it may be, perhaps, conjectured, that no information on such a topic was needed, or was thought material.—An eminent writer<sup>1</sup> has said, “*Neque enim id est celare quidquid reticeas; sed cum, quod tu scias, id ignorare emolumenti tui causâ, velis eos quorum intersit id scire*; a description or proposition within which, according to a just exposition of the expressions “*emolumenti tui causâ*,” and “*intersit id scire*,” the present case certainly, in my

<sup>1</sup> The “eminent writer” referred to by the learned judge is one whose reputation is now well established. Cic. de Off. lib. 3. c. 13.

judgment, is not. I must therefore hold, that Sir John Nelthorpe is entitled to a special performance."<sup>1</sup>

COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS IN  
IRELAND v. DEVEREUX. 13 Sim. 14.

THOMSON v. ADVOCATE-GENERAL. 13 Sim. 153.

*Legacy Duty.—Domicile.*

Personal property follows the domicile of the owner, and is deemed to be locally situate at the place of such domicile wherever the owner himself may happen personally to be. If, therefore, a testator at the time of his death had his domicile in Great Britain, legacy duty will be demandable under the statute 55 Geo. 3. c. 55., although he were a foreigner by birth, and owed allegiance to a foreign state. On the other hand, suppose the testator an Englishman, yet, if at the time of his decease he have a foreign domicile, no legacy duty will be payable. The question, then, as to legacy duty turns always upon domicile. Thus in *Arnold v. Arnold*<sup>2</sup>, the testator was a natural-born Englishman domiciled in India, where he died; but some of his executors and legatees resided in England. His will was proved both in India and England, and his property in India having been remitted to the English executors to be by them administered in England, was in fact administered under the decree of the Court of Chancery. Lord Cottenham nevertheless held, that the duty did not attach upon the legacies paid in England under the sanction of the Court. Again, in *Re Bruce*<sup>3</sup>, the Court of Exchequer held that this duty was not demandable in the case of a foreigner residing abroad, and a will made abroad; although the property, the executors, and the legatees were in England, and the property was administered there.

In the case of *Jackson v. Forbes*<sup>4</sup>, the testator died domiciled in India; his property was situate there, his executors proved the will there, remitted the property in question to this country, and invested it in government stock; and two of the executors afterwards came to this country, and applied the fund so remitted, according to the directions of the will, for the benefit of the residuary legatees. A bill having been filed in Chancery by one of those residuary legatees, the fund was transferred into the name of the accountant-general in trust in the cause. The executors did

<sup>1</sup> For a luminous exposition of the principles on which Sir Knight Bruce proceeded, see *Hunter v. Atkins*, 3 Myl. & K. 113.

<sup>2</sup> 2 Myl. & K. 365.; 2 Myl. & Craig, 256.

<sup>3</sup> 2 Cro. & Jerv. 436.

<sup>4</sup> 2 Cro. & Jerv. 328.

not prove the bill in this country, although the bill, by mistake, alleged that they had done so,—a fact which does not appear to have been noticed in the course of the argument. The question upon the liability to legacy duty came, in the first instance, before the Court of Chancery, by which it was sent, in the shape of a case, to the Court of Exchequer; and that Court certified that, under these circumstances, the legacy duty was not payable. The certificate having been acted upon by Lord Brougham, was made the subject of an appeal to the House of Lords, under the name of *Attorney-General v. Jackson*<sup>1</sup>, where the decision of the Court of Chancery and of the Court of Exchequer was ultimately affirmed.

So in Ewin's case<sup>2</sup>, where a British subject died domiciled in England, the Court of Exchequer held that legacy duty was payable on his property situate abroad in the funds of Austria, Russia, France, and America. In the case now brought to the notice of our readers, the testator, James Fanning, was a native of Ireland, but had acquired a domicile in France. In consequence of the revolution in 1789, he emigrated from thence to England, and his property was confiscated by the French government. He made his will in England: and in 1802 he returned to France, where he died in 1806. His will was proved both in France and England. Under the treaty of peace in 1815, Fanning's estate became entitled to a portion of the French stock appropriated for the compensation of British subjects whose property had been confiscated by the revolutionary government. His executors established his claim; and his share of the stock thus appropriated having been sold by the commissioners to satisfy their award, the proceeds were paid into the Court of Chancery. By Fanning's will, several pecuniary legacies were given, upon which the Crown claimed legacy duty; and a portion of the fund in question having been left in Court to answer that claim, if substantiated, the plaintiffs presented a petition praying the payment of the reserved fund to themselves, on the ground that the testator's domicile was foreign, and that the legacies were consequently not subject to duty. The foreign domicile of Fanning having been established to the satisfaction of the Vice-Chancellor of England, his Honour observed: "The sums awarded to Fanning's executors were clearly French in their origin; and although they subsequently, for the purpose of payment, assumed the form of stock in the English funds, I do not think that circumstance makes any difference. We have, then, the following facts in this case: a foreign domi-

<sup>1</sup> 8 Bligh, N. S.<sup>2</sup> 1 Cro. & Jerv. 151.

cile, a foreign will, and *foreign property*; and it appears to me to be perfectly plain that the legacy-duty is not payable." In the foregoing case it will be noticed that his Honour treated the fund in question as not having lost its original foreign character by its transmission to England. But it has been since decided in the case of *Thomson v. Advocate-General*, that personal property unquestionably English, and wholly situate in England, and collected and administered there by the executors of a native of Scotland, who made his will and died at Demerara, where he was then domiciled and resident, was not subject to legacy duty. The Court of Exchequer in Scotland had decided in favour of the Crown; but the House of Lords, with the concurrence of the Judges, reversed that judgment. The law, therefore, is now settled, in the most unqualified manner, that the foreign domicile of a testator, whether a British subject or a foreigner, protects his property from liability to the legacy duty imposed by the act of George III. The following passage from the judgment delivered by Lord Chancellor Lyndhurst in the House of Lords contains an able review of the decisions upon this subject:

"My lords, it appeared to me, in the course of the argument, that the question turned, as it must necessarily turn, upon the meaning of the statute. In the very first section of the statute, the operation of it is limited to Great Britain; it does not extend to Ireland, it does not extend to the colonies; and therefore, notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the Act; and it is clear, therefore, that they must receive that limited construction and interpretation which is only consistent with the first section of the Act. Accordingly, my lords, it has been determined, in the case which was cited at the bar, in *Re Bruce*<sup>1</sup>, that it does not apply, notwithstanding the extensive terms, to the case of a foreigner residing abroad, and a will made abroad, although the property may be in England, although the executors may be in England, although the legatees may be in England, and although the property may be administered in England. That was decided, expressly, in the case in *Re Bruce*; which decision has never been quarrelled with, that I am aware of, and in which the Crown seems to have acquiesced. Also, my lords, it has been decided in the case of British subjects domiciled in India and having large possessions of personal property in India, that the legacy duty imposed by the Act of Parliament does not apply to cases of that description, although the property may have been transmitted to this

<sup>1</sup> 2 Crom. & Jerv. 436.



country by executors in India to executors in this country, for the purpose of being paid to legatees in England. Those are the limitations which have been put upon the Act by judicial decisions. But then this distinction has been attempted to be drawn, and it is upon this distinction that the whole question turns: it is said, that in this case, a part of the property was in England at the time of the death of the testator; a circumstance that did not exist in the case of the *Attorney-General v. Jackson*, and which did not exist in the case of *Arnold v. Arnold*; and it is supposed that some distinction is to be drawn with respect to the construction of the Act of Parliament arising out of that circumstance. I apprehend that that is an entire mistake; that personal property in England follows the law of the domicile; that it is precisely the same as if the personal property had been in India at the time of the testator's death. That is a rule of law that has always been considered as applicable to this subject; and accordingly, the case which has been referred to by the learned Chief Justice, the case of *Ewin*, was a case of that description. An Englishman made his will in England; he had foreign stock in Russia, in America, in France, and in Austria: the question was, whether the legacy duty attached to that foreign stock which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument, by my noble and learned friend who argued the case, in the first place, that it was real property; but finding that that distinction could not be maintained, the next question was, whether it came within the operation of the Act; and, although the property was all abroad, it was decided to be within the operation of the Act as personal property; on this ground only, that as it was personal property, it must, in point of law, be considered as following the domicile of the testator, which domicile was in England. Now, my lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy. The property, or part of the property, was in this country at the time of the death of the testator; it was personal property; and, following the principle laid down in the case of *Ewin*, it must be considered as property within the domicile of the testator in *Demerara*; and it is admitted that, if it was property within the domicile of the testator in *Demerara*, it cannot be subject to legacy duty. Now, my lords, the only distinction between this case and the *Attorney-General v. Jackson*, and *Arnold v. Arnold*, is that to which I have referred; and that distinction is decided, by the case in *Re Ewin* not to make any difference."

## ATTORNEY-GENERAL V. FITZGERALD. 13 Sim. 83.

*Legacy-duty. — Charity.*

In this case the testator bequeathed his residuary estate, amounting to 13,000*l.*, to his executors, to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about the city of Limerick, as the executors should, in their better judgment, deem meet, to give his bequest the most extensive efficacy. A scheme was approved by the Master; and upon a petition for the transfer of the funds from the Accountant-general to the governors of the charity, it became a question whether such transfer ought to be made *free of legacy-duty*.

The Vice-Chancellor of England: "My opinion is, that this legacy is assessable to the duty at the rate of 10 per cent.; because it is for the benefit of persons *strangers in blood to the deceased*."

## ATTORNEY-GENERAL V. GLADSTONE. 13 Sim. 7.

*Charity. — Legacy. — Lapse.*

Charles R. Blundell bequeathed to the Rev. T. Robinson "the sum of 15,000*l.*, to be by him applied for the use of Roman Catholic priests in and near London, at his absolute discretion." Thomas Robinson died in the testator's lifetime. The Vice-Chancellor of England decided that this legacy could be supported as a charitable bequest. His Honour observed:—"Looking at the language of the will, I am of opinion that the legacy of 15,000*l.* was given for the benefit of persons who, either at the testator's death, or at any time thereafter, might bear the character of Roman Catholic priests in or near London. No objection arises from the indefinite nature of the word 'near;' because, if the fund is given for a charitable purpose, the Court can solve the difficulty with regard to its application, by directing a scheme to be approved by the Master. . . . There is nothing in the words, 'for the use of Roman Catholic priests,' which shows that it was the testator's intention to confine the benefit of the bequest more to those Roman Catholic priests who might happen to be living at the testator's death, or at the death of Mr. Robinson, than to those priests who might come into *esse* after the death of the testator, and before the death of Mr. Robinson, or at any time after the death of both of them. The probability is, that the Roman Catholic, as well as the Protestant Church, will last as long as the world endures, and therefore the words of the testator must, in my opinion, be construed as importing perpetuity, and not as being confined to individuals

living at any given period. . . . In a subsequent part of the will, where the testator meant that particular priests should take a benefit, he has used different language. So that it seems to me that where the testator meant to give a benefit to an individual answering a particular description, he has expressed that intention with great clearness. . . . I shall therefore declare that the purpose for which the legacy of 15,000*l.* is given is a charitable use, and refer it to the Master to settle a scheme for the application of the legacy."

COOKE v. CRAWFORD. 13 Sim. 91.

*Trust Estate. — Devise.*

As wills are frequently drawn in such form as to have the effect of devising trust estates vested in the testator, it seems desirable to quote some observations of the Vice-Chancellor of England upon the practice. His Honour said: "Here I must enter my protest against the proposition, which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate, that he should be allowed to dispose of it to whomsoever he may think proper: nor is it lawful for him to make any disposition of it. *He ought to permit it to descend*; for in so doing, he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the Court, if it were urged to do so, would order the costs of getting the legal estate out of the devisee to be borne by the assets of the trustee. I see no substantial distinction between a conveyance by act *inter vivos*, and a devise, for the latter is nothing but a *post mortem* conveyance: and if the one is unlawful, the other must be unlawful."

DOE v. STEELE. 4 Q. B. 663.

*Repugnancy. — Premises. — Habendum.*

The habendum is a formal, and not an essential part of a deed<sup>1</sup>; and a grant or conveyance may therefore be good without any habendum. Hence, when the habendum is inconsistent with and repugnant to the operative words, the latter prevail, and the habendum will not be allowed to defeat them; as when there is a conveyance to John Styles and his heirs, habendum to John Styles for life; or to John Styles and his heirs, habendum to him and his executors for 100 years. Something of this sort occurred in

<sup>1</sup> Shep. Touchst. 76.

the case of *Goodtitle v. Gibbs*<sup>1</sup>, where land was conveyed to J. Westbrook in fee, habendum to J. Westbrook in fee from and after the death of Martha Hatton ; and the Court of King's Bench, on the ground of the repugnancy between the premises and the habendum, held that J. Westbrook took an *immediate* estate in fee. Had the habendum prevailed, the grant would have been void, as being an immediate conveyance of a freehold, to commence *in futuro*. Lord Tenterden there expounded the relation between the premises and the habendum, and concluded thus : " If an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any habendum ; and if an habendum follow which is repugnant to the premises, or contrary to the rules of law, and *incapable of a construction consistent with either*, the habendum shall be rejected, and the deed stand good upon the premises." The habendum may, however, explain or abridge the import of granting words which would otherwise have received a larger construction : as a grant to John Styles and his heirs, habendum to him and the heirs of his body, Co. Litt. 21 a ; or to John Styles and his heirs during the life of William Baker. This latter proposition is to be found in Mr. Preston's Work on Abstracts, vol. iii. 43., but without a reference to any authority. It is sanctioned, however, by the case of *Doe v. Steele*, now before us. There Sir Thomas Broughton, being seised in fee, demised the lands in question to " Hannah Timmis, her heirs and assigns, to hold to the said H. T. and her assigns during the natural life of George Timmis." Hannah Timmis afterwards died. George Timmis, as heir at law of Hannah, was the lessor of the plaintiff, and claimed the land as special occupant during his own life. The defendants contended that the estate passed to the *executors* of Hannah Timmis, and that the word " heirs " in the premises of the deed was cut down by the habendum. The Court of Queen's Bench did not entirely reject the habendum in consequence of its repugnancy to the premises, but construed the habendum and the premises together. Lord Denman, C. J. : " It is clear that the habendum cannot be rejected altogether, for the effect of that would be to give an estate in fee to Hannah Timmis, whereas the estate intended to be given to her is for the life of George Timmis ; and the proper office of the habendum being to limit, explain, or qualify the words in the premises, provided it be not contradictory or repugnant to them, no doubt can be entertained but that the words ' for and during the natural life of George Timmis ' must be allowed to limit the

<sup>1</sup> 5 B. & C. 709.

duration of the estate, and to explain and qualify the meaning of the word 'heirs' in the premises, so as to make the person designated by that word take as special occupant, and not as heir by descent. But the question arises upon the other words in the habendum, namely, 'to Hannah Timmis and her assigns.' Under these words there would be no special occupant, but the estate on the death of Hannah Timmis would be personal assets by virtue of the statutes 29 Car. 2. c. 3. s. 12. and 14 Geo. 2. c. 20. s. 9. Whereas under the words in the premises 'to Hannah Timmis, her heirs and assigns,' there is a special occupant, namely, her heir. The words of the habendum are, therefore, manifestly contradictory and repugnant to the words in the premises, and must, according to the general rule of construction in such cases, be disregarded." The lessor of the plaintiff therefore recovered the lands as heir by special occupancy of the original grantee, Hannah Timmis.

#### HENNIKER V. WIGG. 4 Q. B. 792.

*Debtor and Creditor. — Appropriation of Payments.*

"The rules" (we quote Sir W. Grant)<sup>1</sup> "by which the application of indefinite payments is to be governed, were probably borrowed from the civil law. The leading rule with regard to the option given in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor — *in re præsentì : hoc est statim atque solutum est : cæterum, postea non permittitur*."<sup>2</sup> If neither applied the payment, the law made the appropriation according to certain rules of presumption depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor, that would, in the first instance, have governed ; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the enquiry was, what application would be most beneficial to the debtor. The payment was consequently applied to the most burthensome debt — to one that carried interest rather than to that which carried none — to one secured by a penalty rather than to that which rested on a simple stipulation ; and if the debts were equal, then to that which had been first contracted. *In his quæ præsentì die debentur, constat, quotiens indistinctè quid*

<sup>1</sup> 1 Mer. 530. ; Clayton's Case, 36. 572. 605. 608.

<sup>2</sup> Dig. Lib. 46. tit. 3. Qu. 1. 3.

*solvitur, in graviolem causam videri solutum. Si autem nulla prægravet—id est, si omnia nomina similia fuerint—in antiquiorem.”*<sup>1</sup>

In the same case, then before him, his Honour decided, that, in a banking account, all the sums paid in form one blended fund, the parts of which have no longer any distinct existence; and that, presumably, it is the first sum paid in that is first drawn out, the first item on the debit-side being discharged, or reduced, by the first item on the credit side. A particular mode of dealing, and more especially an express stipulation, will have the effect of qualifying the general rules laid down by Sir Wm. Grant. Accordingly, in *Henniker v. Wigg*, where Lionel Wigg and four others had executed a joint bond for 1000*l.* to the plaintiffs, who were trustees of the East of England Bank, for securing to the bank the repayment of an advance of 1000*l.* made by the bank to Lionel Wigg, who before the date of the bond had commenced a banking account with the plaintiff's bank, the Court of Queen's Bench being of opinion, upon the evidence, that the bond was intended as a continuing security, held the defendants liable to an action upon the bond, notwithstanding it appeared that, between the opening of Lionel Wigg's account and its close, when a balance of 1505*l.* was against him, the balance had been in his favour to a greater amount than that which was due upon the bond, both for principal and interest.

#### PENNETT V. ATTENBOROUGH.

##### *Usurious Loans on the Security of Goods, when lawful.*

The stat. 39 & 40 Geo. 3. c. 99. s. 6., usually called the Pawnbrokers' Act, requires certain entries in a book to be kept by the pawnee, that a duplicate or memorandum in writing should be delivered to the pawnor, and that certain other specified requisites should be complied with in all dealings which fall within the provisions of the statute. A person named Newton, afterwards a bankrupt, before his bankruptcy pledged with the defendant Attenborough, who was a pawnbroker, a quantity of plate and jewellery, on loans of more than 10*l.*, the defendant reserving interest at the rate of 15*l.* per cent., but not complying with the requisites of the Pawnbrokers' Act. In trover, by the assignees of Newton, to recover the value of the articles pledged, the Court of Queen's Bench, in conformity with the decision of Lord Tenterden in *Cowie v. Harris*<sup>2</sup>, and of the Court of Common Pleas, in *Tregoning v. Attenborough*<sup>3</sup>, held that the Pawnbrokers' Act does not apply to

<sup>1</sup> Dig. Lib. 46. tit. 3. Qu. 5.

<sup>2</sup> Moody & M. 141.

<sup>3</sup> 7 Bing. 97.

loans of more than 10*l.*; and the act 2 & 3 Vict. c. 37. s. 1., enacting, that no contract for the loan or forbearance of any money above the sum of 10*l.* sterling shall, by reason of any interest taken thereon or secured thereby, be void by reason of any statute or law in force for the prevention of usury, except as to loans made on the security of land, that Court, in accordance with a previous decision of the Court of Exchequer, held, that the loan in question was within the protection of the act, and that usurious loans on security other than that security were no longer unlawful.

**FITZBALL v. BROOKS.** 2 Dowl. & Lown. 477.

*Action for Recovery of a Debt within 7 & 8 Vict. c. 96. s. 57.*

The stat. 7 & 8 Vict. c. 96. s. 57. enacts, that after the passing of that Act no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's Superior Courts, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment; and an action of debt having been brought against the defendant, to recover penalties under the Dramatic Copyright Act (3 & 4 Wm. 4. c. 15. s. 2.), in which judgment was signed by default for 12*l.* debt, and 10*l.* 15*s.*, the Court was called upon to determine whether such an action could be considered for the recovery of a debt within the meaning of the statute first cited. The Court of Queen's Bench held that the action was one for the recovery of a debt within the meaning of 7 & 8 Vict. c. 96. s. 57., and that the defendant was entitled to be discharged from custody under that section.

**COURTENAY v. WILLIAMS.** 3 Hare, 539.

*Statute of Limitations.*

The Statute of Limitations, 21 Jac. 1. c. 16., cuts off all judicial remedies against debtors unless proceedings are instituted within six years after the cause of action has accrued. But it leaves the creditor's *right* unaffected. The debt is still due. And herein we are to discriminate between the principle of the Act of James and that of the recent statute limiting the time for bringing actions and suits relative to real property, the 3 & 4 Will. 4. c. 27., by which last, the right itself, as well as the remedy, is utterly extinguished and put an end to. Thus, under the Act of James, it is settled law, that if a creditor, by means of a lien, can pay

<sup>1</sup> Turquand v. Mosedon, 7 Mees. & W. 594.

himself without resorting to an action, he may do so without impeachment. There is nothing to prevent him.<sup>1</sup>

Recognising these distinctions, Vice-Chancellor Wigram, in the above case, held an executor to retain so much of a legacy as was sufficient to satisfy a debt due from the legatee to the testator's estate, although that debt, as regarded all direct judicial remedies, was barred by the 21 Jac. 1. c. 16, — a decision arrived at after much consideration, and an anxious reviewal of authorities.

SMALLCOMBE V. OLIVIER. 13 Mec. & W.

*Bankruptcy. — Annulment of Fiat.*

The plaintiff signed judgment, and issued a writ of *fi. fa.* against the goods of J. S., which was placed in the hands of the defendant, as sheriff of Wilts, to execute, after a fiat in bankruptcy had issued against J. S. under which he was declared bankrupt, and assignees were appointed. Before any return was made to the writ of *fi. fa.*, the Court of Review ordered that the fiat should be annulled if the Lord Chancellor thought fit, and shortly after, the Lord Chancellor made an order annulling the fiat. On the day of the date of the Lord Chancellor's order, the defendant returned *nulla bona*, and the plaintiff brought his action for a false return.

The 1 & 2 W. 4. c. 56. s. 19. enacts, that an order of the Lord Chancellor for annulling a fiat shall have the same force and effect as a writ of supersedeas of a commission then had. The question therefore was, whether the effect of the writ of supersedeas under the old law was retrospective or not? If the effect of annulling the fiat was to invalidate all that had been done under it, the goods of the debtor had always continued his property, and the return that he had no goods was false. If, on the other hand, the goods of the debtor were vested in his assignees at the time when the sheriff made his return, the return was correct, and the sheriff would not have been warranted in taking the goods.

After an elaborate review of the statutes, arguments, and cases, the Court of Exchequer determined, in opposition to the dicta of Lords Hardwicke and Eldon<sup>2</sup>, and contrary to the express decision of the latter in *Ex parte Smith*<sup>3</sup>, that the only effect of a writ of supersedeas was to deprive the commissioners of any further authority to proceed upon the commission, and that it had no

<sup>1</sup> *Spears v. Hartley*, 3 Esp. 81. ; *Higgins v. Scott*, 2 B. & Adol. 413.

<sup>2</sup> *Ex parte Leaverland*, 1 Atk. 145. ; *ex parte Jackson*, 8 Ves. 533. ; *ex parte Edwards*, 10 Ves. 104. ; *Twogood v. Hankey*, Buck, 67.

<sup>3</sup> Buck, 262. n.



effect on acts done before the supersedeas had issued. Applying this rule to the case under consideration, it was held that the sheriff was justified in returning *nulla bona*, and was entitled to the judgment of the Court in the action.<sup>1</sup>

BROWN v. BOORMAN. 11 Clar. & Fin. 1.

*Broker. — Contract. — Negligence. — Damages.*

In January, 1836, the plaintiffs, linseed-crushers at Branbridges in Kent, employed the defendant, an oil-broker in London, to sell for them certain quantities of linseed oil. A sale was effected by the defendant, to whom the plaintiffs consigned the commodity to be delivered by him to the buyer *upon payment of the price*. The defendant, however, notwithstanding this special agreement, delivered the oil without receiving payment; and the action was brought to recover damages in respect of the loss consequently sustained. The cause was tried before Lord Denman, and the jury returned a verdict for the plaintiffs. The defendant moved an arrest of judgment, on the ground that the declaration, which was in case, did not state a good cause of action; and judgment went for the defendant. But upon a writ of error in the Exchequer Chamber, that judgment was reversed. The defendant thereupon carried the cause, by a further writ of error, to the House of Lords; where, after copious argument, the following opinions were delivered:—

<sup>1</sup> The speech of the Lord Chief Baron (Pollock) in delivering the judgment of the court was very elaborate. The following extract from it furnishes a happy exemplification of the *reductio ad absurdum*:—"It is said that before the act which established the Court of Bankruptcy, the writ of supersedeas had such an effect, that, whatever might have been done under the commission, the writ of supersedeas annulled every thing, and put the bankrupt and his estate, his debtors and his creditors, in precisely the same situation as if no commission had been issued. This is certainly a very startling proposition. . . If the bankrupt does not duly surrender at the time required by the statutes, he is guilty of felony, now punishable by transportation for life, but which, until lately, was capital. And yet, what is contended for is, that, before conviction, it is in the power of the Lord Chancellor to convert that which was a capital felony into a perfectly innocent act. Again, while the fiat is in force, if the bankrupt has omitted to surrender, and has so committed felony, it may become necessary for peace officers or others to use force towards him, in order to his apprehension; and under certain circumstances, even to take away his life, if he cannot be otherwise taken. Can it be possible that the Lord Chancellor, by superseding a commission, or now, by annulling a fiat, can make a man a criminal and a murderer, who at the time of the act done did no more than his duty?" These are, no doubt, extreme cases; but they serve to test the correctness of the proposition contended for, which undoubtedly leads to all the consequences we have pointed out, and to many others equally absurd.

Lord Brougham: "It appears to me that the Court of Exchequer Chamber has come to a right conclusion, which renders it wholly unnecessary, in the view I take of the case, to ask whether the Court of Queen's Bench was right in its notion of the office of a broker, namely, that he was not to do more than to make contracts; that he was not to obtain a ready-money price for the goods he should sell, or even to sell goods consigned to him, which, indeed, is rather the office of a factor or a consignee than of a broker. But a broker, besides making contracts and passing the property in goods, which are his proper functions, may specially contract to act as factor or consignee. He may thus contract to receive the consignments upon the trust reposed in him; he may undertake to have the control over the goods, and to deliver them for the price stipulated, which in this case was a ready-money price. The breach is, that he delivered them on *credit*, whereby the plaintiffs were damnified. I think the authorities show that this declaration is, after verdict, sufficient. After verdict, the absence of technical words is immaterial. It is enough that there is an averment that the undertaking of the defendant has not been fulfilled, and that, in consequence, loss has accrued to the plaintiffs."

Lord Cottenham assented to the law laid down by the Chief Justice (Tindal), in delivering the judgment of the Court of the Exchequer Chamber, namely, "That the duty of the defendant arose from his express contract so stated in the declaration, and not simply from his character of broker." "It is said" (the noble and learned lord proceeded) "that the proper remedy would have been by an action of *assumpsit*, and not by an action on the case. The authorities referred to disprove that proposition altogether, and demonstrate that the proceeding here resorted to was the proper one where there were duties imposed upon the party by an express contract, which duties were distinct from the ordinary duties of brokers as such."

Lord Campbell concurred. Judgment of the Exchequer Chamber affirmed with costs.

REGINA V. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY. 1 Q. B. 558. 2 G. & D. 49.

THE QUEEN V. THE GRAND JUNCTION RAILWAY COMPANY. 1 D. & M. 237. 4 Q. B. 18.

*Assessment of Railways to the Poor Rate.*

By the General Assessment Act, 6 & 7 Will. 4. c. 96. s. 1., the rate for the relief of the poor is to be made on an estimate of "net annual value," which is declared to be the rent at which

the hereditaments may reasonably be expected to let from year to year, subject to certain specified deductions. The difficulty of applying the principle of this Act to railways has already occasioned numerous appeals to the quarter-sessions, and has been the subject of anxious consideration by the Court of Queen's Bench in the above cases. The Railway Acts authorising the several companies to take tolls, also contain provisions entitling the public, upon payment of the tolls, and subject to such regulations as the companies are empowered to make, to use the railway as a highway. By other provisions the companies are respectively authorised to provide power for propelling and conveying persons and things on their railway, and, for this, to make such charges as they think fit, in addition to the tolls. In the case of *The Queen v. The London and South-western Railway Company*, it appeared that the railway, which was seventy-seven miles in length, passed for four miles and a half through the parish of Mitcheldever (Wilts), but that the company had no station nor warehouses in the parish. It also appeared that the company had in fact a monopoly of the carrying business on their own line.

The first question arising was, how the proportion of the profits in the parish, as compared with those of the whole line, should be estimated? On the part of the parish it was contended, that the proportion of the length or quantity of railway in each parish should be taken simply, assuming the profits to arise equally through the whole length of the line: whilst, on the other hand, it was argued, that the rate should be proportioned to the profit the company derived from the use of the land in the particular parish. It was ultimately conceded, that the rate should be proportioned to the actual earnings of the company in the parish. The more difficult question then came to be considered, whether the company were entitled to exclude from the estimate of rateable value all they earned by being carriers as well as owners of the soil? Had other carriers used the railway, the company taking nothing beyond the tolls they were authorised to receive, it was admitted that the tolls would measure the value of the occupation; but as the company were the only carriers *de facto*, it was contended that this privilege annexed to the ownership would induce a tenant to give an increased rent for the railway, on which increased rent the assessment should be taken. On the other side it was urged, that it was by mere accident the company were the only carriers, and that the advantages enjoyed by the company as carriers were not such as attached to their character as freeholders, or which would pass by a demise. It was forcibly put, that were the company to lease their interest in that part of the railway running

through the parish, all the tenant would take by the demise would be the portion of the railway itself and the right to the perception of the toll. It was agreed between the parties, that if the principle of rating contended for by the parish was found to be correct, the company should be rated at the sum of 3800*l.*, whilst, if the principle sought to be established by the company prevailed, the rate should be reduced to 1283*l.*

The Court of Queen's Bench decided that, according to the established principle of rating, the rate must be assessed on the occupier in respect of the beneficial nature of his occupation, and that, in estimating the amount, all the existing circumstances, whether permanent or temporary, which would govern the amount of rent to be asked or given, should be considered. The fallacy was pointed out of confounding that which a lease conveys a legal title to, and that which it gives the lessee the means of doing or enjoying. It was clear that a higher rent might be obtained, in consequence of the facilities enjoyed by the company for carrying on a lucrative traffic as carriers, and upon that principle the Court determined in favour of the larger sum, and against the principal contended for by the company. In the case of "*The Queen v. The Grand Junction Railway Company*," it appeared that the company conveyed passengers and goods, in common with other parties who exercised the right of being carriers, subject to the control of the company, and to the payment of the tolls or tonnage fixed by the Act of Parliament. The circumstance that the railway was not in the exclusive occupation of the company, and that it was not only open in point of law, but in fact, to competing carriers, it was urged, distinguished this case from that of the preceding case of *Regina v. The South Western Company*," and that if the company was rated beyond the amount receivable for tolls, it would be rating them upon what must be considered strictly as the profits of trade.

The Court, however, after hearing the case twice argued, adhered to the principle laid down in the case of "*Regina v. The South Western Railway Company*," and decided that the two cases were identical in principle; and that the difference in fact, though fit to be taken into account when calculating the quantum, was in other respects immaterial. It was further decided, in the case of "*The Queen v. The Grand Junction Railway Company*," that no deduction should be made from the supposed rent on account of what might be called goodwill, though other deductions might be reasonable and proper.<sup>1</sup>

<sup>1</sup> Should the case arise in which a railway company do not exercise the right of carrying passengers and goods, but derive a profit exclusively from the per-

RODEN v. RYDE. 4 Q. B. 626.

*Bill of Exchange. — Identity of Defendant.*

It is laid down by Mr. Phillips, in his Treatise on the Law of Evidence, that in an action on a bond, or on a promissory note or bill of exchange, and in other cases, *some* evidence of identity will be necessary to connect the party with the instrument; and that, with a view to establish the identity of the party, and to show that the person who executed the instrument is the party to the suit, or the party charged, proof of the party's handwriting may be important and most satisfactory evidence. Proof of his signature would be decisive; but that proof is not absolutely necessary, and much slighter evidence will be sufficient.<sup>1</sup> The case now before us shows that proof of the signature of a bill of exchange by a person bearing the same name as the defendant, is *primâ facie* sufficient evidence to charge him with the liability, unless from the frequency of the name, or from other special circumstances, such evidence is manifestly deprived of its ordinary weight.

WALTON v. MURCALL. 13 Mees. &amp; Wel. 72.

*Promissory Note. — Notice of Dishonour to Guarantee.*

By an agreement in writing, in consideration that the plaintiff would accept a promissory note of one Johnson, payable six months after date, the defendant guaranteed to pay the amount of the note to the plaintiff in case it should not be honoured and paid at maturity by Johnson. The note not having been paid at maturity, the plaintiff brought his action on the agreement. The defendant pleaded that there had been no presentment to Johnson, and also that he, the defendant, had received no notice of the dishonour of the note. *Per curiam*, — The defendant, not being a party to the note, was not entitled to notice.

WINTER v. DIBDIN. 13 Mees. &amp; Wel. 25.

*Arrest. — Queen's Chaplain. — Privilege.*

The defendant, Dr. Dibdin, was one of the Queen's Chaplains in Ordinary; and, as such, was liable to be called upon at any time to officiate before her Majesty. He also received a salary for this

ception of tolls, in accordance with the principle involved in the decisions above referred to, the rate must be estimated by the amount of the tolls received, whilst those who exercise the lucrative business of carriers will contribute nothing to the parochial rates.

<sup>1</sup> Vol. i. 214, ed. 1848.

office ; and, upon these grounds, obtained a rule to show cause why he should not be discharged out of the custody of the sheriff, who had arrested him under a *ca. sa.* Pollock, C. B. "The defendant is clearly entitled to be discharged."

**MORRISH v. MURREY.** 13 Mees. & W. 52.

*Arrest. — Sheriff. — Illegal Entry.*

In this case a sheriff's officer, for the purpose of arresting a woman under a *ca. sa.*, entered and searched the house of a third person. It turned out that the woman was not in the house at the time ; and this entry was therefore decided to be illegal, although the woman resided there immediately before the entry, and the officer had reasonable cause to suspect that she was in the house.

Alderson, B. : "A party who enters the house of a stranger, to search for and arrest a defendant, can be justified only by the event. If a sheriff enters the house of the defendant himself, for the purpose of arresting him or taking his goods, he is justified, if he has reasonable grounds for believing that the party or his property is there ; but here the party to be arrested was not found in the house of the plaintiff, and therefore the defendants were not justified."

**QUANYON v. TOOGOOD.** 13 Mees. & W. 27.

*Sale. — Vesting. — Execution.*

In August, 1843, the plaintiff agreed to sell to Douglas a house and furniture, of which Douglas was then tenant, for six months ; and the purchase-money was to be paid on the completion of the title. Pending the completion of the title, the tenancy of Douglas expired ; and the parties, by mutual consent, subsequently rescinded the contract of sale, and a few days afterwards Douglas gave up the house and furniture to the plaintiff. But before Douglas had thus relinquished possession, the furniture had been taken in execution upon a judgment against him ; and the question upon a special case was, whether the effect of the agreement for sale was to vest the property in Douglas from and after the date of the agreement. Alderson, B. : "This is a sale of the house and furniture ; but no property passes till the completion of the contract, and before that event occurs the sale is rescinded by mutual consent. A third party has no right to intervene, and take the goods in execution ; otherwise nobody could safely sell a furnished house, without searching for judgments against the purchaser, even though he might have contracted to have the purchase-money down." Judgment for the plaintiff.

THE QUEEN v. NOTT. 4 Q B. 768.

*Indictment against a Magistrate administering illegal Oaths.*

It is an inflexible rule of criminal pleading, that where a statute describes prohibited acts simply by their legal character, it is not sufficient merely to aver that a party indicted was guilty of such acts describing them by their legal character. The facts must be stated with sufficient minuteness, to show the Court that they possess the legal character imputed : otherwise it must be left to a jury to draw an inference of law. This rule is exemplified in the judgment of the Court of Queen Bench in "*The Queen v. Nott*," which was an indictment against a magistrate of the county of Devon, founded on the stat. 5 & 6 W. 4. c. 62. s. 13., which declares, "that it shall not be lawful for any justice of the peace, or other person, to administer any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance, by some statute in force at the time being." The indictment averred, that the matter in respect of which a deposition was taken by the defendant, was a matter whereof he had not then jurisdiction or cognizance by any statute, but the subject matter of the oath was not set out, and the Court held that although it might not be necessary to set out the words of the oath, or the whole statement sworn to in the indictment, it should have contained some distinct allegation as to the matter or thing touching which the oath was administered, sufficient to show that it was not one of which the defendant had cognizance. Upon this ground, the Court set aside a judgment pronounced against the defendant at the Assizes, under the stat. 11 G. 4 & 1 W. 4. c. 70. s. 9.

IN RE HENRY LLOYD HARRIES. 13 Mees. & W. 3.

*Taxing Attorney's Bill after Payment.*

It has been determined by the Court of Exchequer, in this case, in conformity with a previous decision of the Master of the Rolls<sup>1</sup>, that where a client gives a bill of exchange or promissory note to his attorney for the amount of his bill, which bill of exchange or promissory note is ultimately paid, the application to tax "within twelve months after payment," as prescribed by the Attornies and Solicitors Act, (6 & 7 V. c. 73. s. 41.) is in time, if made within twelve months after the bill or note was actually paid, although more than twelve months has elapsed since the bill or note was

<sup>1</sup> Sayer v. Wagstaff, 5 Beav. 415.

originally given. The statute, however, would admit of a different construction, of circumstances appeared to shew that the parties treated the bill if exchange or promissory note as an actual payment, and not merely as a security.

TORRENCE v. GIBBINS, 1 Dav. & Mer. 226. 13 Law, J. 36 Q. B.

DUNFORD AND OTHERS v. TRATTLES, 12 Mees. & Wal. 529.

*Pleading. — Effect of "Not Guilty" in Case.*

The restrictive operation of the general form of traverse known as "the general issue," under the new pleading rules of Hill 4 W. 4., has occasioned a series of decisions of great practical importance to the pleader. If any material fact alleged in a declaration be not put in issue by the general issue, or specially traversed, the defendant at the trial is precluded from disputing such fact: on the other hand, if any fact be specially traversed which may be put in issue by the general form of denial, the plea is bad on special demurrer, as amounting to the general issue, and thereby creating unnecessary prolixity of pleading. The importance of determining what facts are, or are not, put in issue by the plea of the general issue, is therefore manifest. In actions on the case, according to the pleading rules, the plea of "not guilty" operates "as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant." The action of seduction proceeds upon the injury alleged to be sustained by the plaintiff, from the loss of the services of the party seduced. In *Torrence v. Gibbins* the question arose, whether to a declaration, alleging that the party seduced was at the time of the seduction the servant of the plaintiff, the defendant wishing to dispute the fact, might traverse the service *modo et forma*, or content himself with the plea of "not guilty." The point came before the Court of Queen's Bench upon a special demurrer, on the ground that the plea traversing the service was an argumentative plea of "not guilty," and should have been so pleaded. In support of the demurrer it was contended, that the cause of action was not the seduction, but the injury resulting from it to the plaintiff by reason of the party seduced being his servant, and that the seduction of the plaintiff's servant was the "wrongful act" put in issue by "not guilty." On the other hand, it was argued, that although the character of master and servant was stated substantively in the declaration, it was merely matter of inducement and that any material matter of inducement must be specially traversed. The Court held, that seduction was *prima facie* an injurious act, put in issue by the plea of "not guilty," but that the denial that injury resulted to the plaintiff, was properly a subject of a special plea.



The operation of the plea of "not guilty" in case, was also brought under the consideration of the Court of Exchequer in *Dunford and others v. Trattles*. There the declaration stated, that the plaintiffs were possessed of a ship, and that the defendant was possessed of another ship, and that the defendant's ship, by the carelessness and mismanagement of his servants, ran foul of and damaged the plaintiff's ship. On the trial, the injury through the mismanagement of the persons on board the ship alleged to be the defendant's was proved, but the plaintiff gave no evidence to show that the vessel was the property of the defendant, which, his counsel contended, was necessary to entitle him to a verdict on the issue raised by the plea of "not guilty." Wightman J., who tried the cause, thought the defendant's ownership was admitted on the pleadings. The question was afterwards brought before the Court on motion for leave to enter a nonsuit. In argument it was admitted, that if the case of *Taverner v. Little*<sup>1</sup>, which was an action on the case against the defendant for negligently driving his horse and cart against the plaintiff's horse, could be supported, the ruling of Wightman J. was correct, as in the last-mentioned case it was expressly held, that under the plea of "not guilty," the defendant was not at liberty to shew that the cart did not belong to him. The cases of *Woolf v. Beard*<sup>2</sup>, *Hart v. Crowley*<sup>3</sup>, and the first-mentioned case of *Torrence v. Gibbins*<sup>4</sup> having been cited for the plaintiff, the Court unanimously held, that the plea of "not guilty" did admit that the defendant was possessed of the vessel that injured the plaintiffs, and that if it was desired to deny the fact, a traverse might have been taken on it, which would not be demurrable.

ARMANI v. CASTRIQUE. 2 Dowl. & Lown. 432. (Exchequer.)

*Pleading. — Declaration on a Foreign Bill of Exchange.*

The declaration by indorsee against indorser of a bill of exchange omitted to state where the bill was drawn, following the form given by the rule T. T. 1 Wm. 4. for declaring on an inland bill. The defendant by his pleas respectively denied the drawing and indorsing of "the said inland bill of exchange *modo et forma*." On special demurrer the Court held that the pleas were good, for that where a bill is declared upon, as against an indorser, as an inland bill, the defendant had a right so to treat it, and to exclude all ambiguity by so calling it. The declaration against the maker or indorser of a foreign bill ought to state it to be a

<sup>1</sup> 5 Bing. N. C. 678. ; 7 Scott, 796.      <sup>2</sup> 8 Car. & P. 373.

<sup>3</sup> 12 Ad. & El. 378.

<sup>4</sup> 1 Dav. & M. 226, 13 L. J. 36 Q. B.

foreign bill, as different consequences resulted and different rules of law were applicable to foreign and inland bills.

Another point was raised by the demurrer in this case, on which the Court gave no conclusive judgment, and which it seems extraordinary should not have been before settled, namely, whether it be competent for the indorser of a bill to set up as a defence in an action by the indorsee, that the bill was not drawn by the person purporting to be the drawer. The Court of Common Pleas held in a late case<sup>1</sup> that the acceptor of a bill was stopped from disputing the drawing, and as suggested in the judgment in *Armani v. Castrique*, whatever be the legal merits of the plea, the fact of indorsement would be almost irresistible evidence as to the drawing and prior indorsement.

HODGSON v. WARDEN. 13 Mees. & W. 22.

*Pleading. — Excuse for want of Profert, when sufficient.*

When a defendant by his plea relies on a deed to which he is a party or privy, he is required to make profert of the instrument. Thus in an action against the maker of a promissory note, where the defendant pleaded a release by the plaintiff, under an assignment to trustees for the benefit of creditors, and as an excuse for profert, the defendant pleaded that there was but one part of the deed, and that it had always been in the possession of the trustees, who refused to permit the defendant to have the possession thereof, the Court of Exchequer held the excuse insufficient, observing, that as there was but one part of the deed, the trustees held it as trustees for all the parties interested; and that although the refusal of the trustees to permit the defendant to have the deed for the purpose of profert, may render them liable in damages, it would not justify a departure from the settled rules of pleading. When a surety guarantees the payment of money, and afterwards relies on an indenture of release from the plaintiff to the principal, he may plead the release without profert, for there is no privity of interest between the principal and surety, since the latter only contracts with the creditor.<sup>2</sup>

SANDERS v. COWARD. 13 M. & W. 65.

*Pleading. — Statute of Limitations in Debt on Bond.*

Declaration on a bond. The defendant craved oyer of the bond and condition. The condition appeared to be for the payment of a sum of money, and also for the performance of certain

<sup>1</sup> *Sanderson v. Coleman*, 4 Man. & G. 209., 4 Sc. N. R. 638.

<sup>2</sup> *Bain v. Cooper*, 8 Mees. & W. 751.

covenants contained in a deed. After setting out the condition, the defendant pleaded, that "the cause of action did not accrue within twenty years next before the commencement of the suit." Special demurrer, on the ground that the defendant should have shown by his plea whether he pleaded to the cause of action in respect of the original forfeiture of the bond, or with reference to the subsequent breaches of the condition, which might be one or many.

In support of the plea it was urged, that it followed the words of the 3 & 4 Wm. 4. c. 42., which enacted that all actions upon any bond or specialty should be commenced within twenty years after the cause of such action or suit, but not after. For the plaintiff it was argued, that the cause of action or suit meant the right to sue.

The Court of Exchequer held that the plea was bad, as it left it doubtful what the defendant meant, and ought to have shown distinctly that there had been no breach of the condition of the bond within twenty years next before the commencement of the suit.

ALEXANDER v. ANDERDON. 6 Beav. 405.

*Practice in Equity. — Summary Relief.*

In this case the defendant petitioned for a taxation of his solicitor's bill of costs, on the footing of a special agreement, and for an inquiry to ascertain what was due from him to the latter generally; praying also a declaration that a certain promissory note had been satisfied. As it thus appeared that the relation between the defendant and his solicitor was something more than the ordinary one of solicitor and client, Lord Langdale, M. R., was of opinion that the Court, under such circumstances, had no authority to grant relief upon petition, but that it was open to the client to file a bill, if he thought proper. His Lordship had previously decided the same point<sup>1</sup>, upon a somewhat similar application, by a country solicitor against his London agent.

RE WARWICK RAILWAY COMPANY. 13 Sim. 31.

*Practice in Equity. — Payment of Money out of Court.*

In pursuance of the standing order of the House of Commons, a deposit of 10*l.* per cent. on the capital of this railway company had been paid into the bank in the joint names of several of the projectors. The Act of Incorporation having been obtained, the persons in whose names the money was standing presented a

<sup>1</sup> *In re Smith*, 4 Beav. 309.

petition under the Act, praying that the amount might be paid to Mr. Glyn, who was banker to the company; and the Vice Chancellor of England made the order accordingly. The general rule, however, has been, that where a sum of money exceeds 10*l.* it cannot be paid out of court to any person but the party entitled to it; and in *Attorney-General v. Barnard* at the Rolls, where *two* trustees of a charity prayed that certain monies in court, distributable among the objects of the charity, might be paid to *one* of the trustees for the purpose of distribution, Lord Langdale, M. R., declined to make an order in that form, and directed the money to be paid to both the petitioners.<sup>1</sup>

BREESE v. JERDEIN, BEAUMONT, & BRADLEY. 4 Q. B. 585.

*Practice at Common Law. — Notice of Action.*

For the protection of persons acting in the execution of the Metropolitan Police Act (10 Geo. 4. chap. 44.), sect. 41. provides, that in case of an action against any person for any thing done in pursuance of the Act, "notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action." The defendant Beaumont, being an officer of the metropolitan police, was served with a notice, one calendar month before action, of the intention of the plaintiff to issue a writ of summons for the detention of the plaintiff, without reasonable or probable cause, on or about the 27th May last past, and for his imprisonment afterwards in the Compter. The Court of Queen's Bench held, on the authority of *Martins v. Upcher*<sup>2</sup>, that the notice was insufficient, as it omitted to describe the place where the act complained of occurred. The case referred to was decided upon the statute 24 Geo. 2. c. 44., which, though the language is not precisely similar, is substantially the same as that of the Metropolitan Police Act. In *Martins v. Upcher*, it was further decided, that the omission to specify the place at which the act complained of occurred, is cured by the magistrate pleading a tender of amends.<sup>3</sup>

<sup>1</sup> Trin. T. 1839, M. S.; and see *Shortbridge's case*, 12 Ves. 28.

<sup>2</sup> 3 Queen's Bench, 662.

<sup>3</sup> In a more recent case in the Exchequer, where the notice stated that the plaintiff was arrested at St. Asaph, in Flintshire, on the 30th of January, on a charge of felony, that he was taken in custody from thence to Denbigh, and detained in custody on such charge for twelve hours, and also, that he was, on the same charge, taken before certain magistrates, the court held the notice sufficient and observed that too much strictness ought not to be required in notices of this kind. *Jones v. Nicholls*, 2 D. & L. 425.

HAWKINS v. BENTON and another. 2 Dowl. & Lowndes, 465.

*Practice at Common Law. — Personal Service of Rule directing Payment of Money awarded.*

The statute 1 & 2 Vict. c. 110. s. 18. enacts, that "all rules of Courts of Common Law, whereby any sum of money, or any costs, charges, or expenses shall be payable, &c. shall have the effect of judgments." To enable parties to issue execution on a rule of Court for payment of money due on an award, and avoid the inconvenient procedure by attachment, the Courts under this statute, have established the practice of calling upon the party liable to pay, to show cause why he should not pay the sum awarded and specified in the rule. The occasional difficulty of effecting personal service of the award and master's allocatur, before applying for the rule, has, however, suggested a consideration of the question, whether personal service might not in some cases be dispensed with? In the above case, Pattison J. stated the practice to be, that in cases of this kind the same formalities should in general be observed as in cases of motions for attachments, but that, under special circumstances, such strictness might be dispensed with; and where it clearly appeared from the admission of the party, that he was aware of the award and its contents, the learned judge granted a rule to shew cause why he should not pay the sum awarded, although there had not been a personal service.

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## POSTSCRIPT.

Since our last number, a commission has been appointed for inquiring into the expediency of altering the circuits of the Judges in England and Wales. It appoints Sir James Parke, Sir Edward Hall Alderson, Sir John Taylor Coleridge, James Stuart Wortley, Fitzroy Kelly, William Whateley, John Greenwood, Sir William Heathcote, Edmund Denison, and Thomas Grimston Bucknall Estcourt, or any five or more of them, to be "commissioners for inquiring and considering whether it would be expedient, with a view to the more convenient and better administration of justice, that any and what alterations should be made in the division of England and Wales into circuits for judicial business, and in the periods for holding such circuits, and whether it would be necessary or proper that any change should be made in the law terms for the purpose of such alterations, and also for considering in what manner such alterations may be best effected."

A commission has also passed the Great Seal, revoking the former Criminal Law Commission, and appointing the Right Honourable Sir Edward Ryan, Kt., Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, Esquires, to be Her Majesty's Commissioners on Criminal Law; and appointing James John Lonsdale, Esq., Barrister-at-law, to be Secretary to the Commission.

We understand the objects of the commission are the completion by Messrs. Starkie and Ker of the report on procedure upon which they were engaged at the time of revoking the former commission — the revision by all the Commissioners of the Digest of Crimes and Punishments, prepared by the old commissioners; and the reporting respecting such statutes relating to criminal matters, as in the opinion of the Commissioners ought to be repealed.

The Society for Promoting the Amendment of the Law is proceeding very satisfactorily. We anticipate great advantages from its labours. It affords the means of applying to the science of the law that mode of investigation which has been found so useful in every other science, and to which, it appears to us, the law should form no exception. The examination of subjects connected with law amendment, first by a committee which makes a report to the general body; the discussion of that subject first by the committee, and then by the general body; the printing these reports,



and their diffusion in the shape of the Transactions of the Society, must be attended with benefit. In some respects the Society is better than any commission, and it is certainly better than any parliamentary committee, where witness after witness is called in and examined separately, no attempt being made to bring these witnesses together, and in this way arrive at the truth. These two modes which have hitherto formed the sole basis of legislation, are, in our opinion, both inferior to the plan proposed by the Society of having subjects discussed by all branches of the profession, assisted by other persons not in the profession. We are glad, therefore, to find that many competent persons are taking an interest in the Society, and that it has already made much progress in many subjects which have engaged its attention. It is right, while we say this, and express our hearty wishes for the welfare of the Society, and belief in its usefulness, to mention that this Review is not its organ, and has in fact no connection with it, other than having on many points common objects in view.

The Transfer of Property Act of last session is in abeyance. It remains a dead letter. The first day of the present session, as we anticipated in our last number, brought the promise of an Amendment Act. This we understand will amend it altogether by the repeal of the whole: some portion from the date of the repealing Act; and the rest of it from the time when it came into operation<sup>1</sup> (the 1st January last). It is no easy subject to legislate on, but many and significant symptoms from various quarters, convince us that no small measure of amendment on this subject will do. Public and professional expectation is beginning to be roused, the common assurances of the country must not be the subject of a series of small (although perhaps useful) experiments; the whole question should be committed to proper persons, the task left unfinished on the termination of the Real Property Commission must be performed, the various plans of reform now before the profession should be investigated, and it should either be pronounced from authority that no alteration is necessary or possible, or a complete and thorough reform should be made. Nothing less than this will or should satisfy the pro-

<sup>1</sup> We hope this may extend to the second section, which has certainly puzzled the conveyancers most effectually; and if it is allowed to stand, will puzzle them while parchment endures. No one can tell what the deed is to be called which takes operation under it. A familiar passage in Macbeth has been thus applied:—

“*Lord Chancellor.* — How now, you secret, black, and midnight hags! What is it you do?”

“*All* (conveyancers). — *A deed without a NAME.*”

The second clause, coupled with the inexplicable thirteenth, sealed the fate of the Act.

fession, no other course is safe or wise: and as it was to Sir Robert Peel's administration that we owe the first Real Property Commission, so we trust it is to him that we shall owe the second.

We have adverted in the present number to several measures now before Parliament. In addition to these we should mention that Lord Campbell has brought in a bill for abolishing deodands, and that he has renewed his bill for allowing service of process abroad on persons being indebted and having property in this country. Those are both useful measures, and we trust that no formal objection will be suffered to prevent them passing into law.

The Government having brought in no Bill on Ecclesiastical Courts in the present session, Lord Cottenham has introduced his former Bill. Surely these Courts cannot be left in their present state.

There is a great demand for legislation as to the clause of the Act of last Session abolishing imprisonment for debts under 20*l*. An Amendment Act will be introduced either by Lord Brougham or by the Lord Chancellor. It should be observed that the former Noble Lord is not the author of this clause, as has been supposed.

It will be seen that there are now many important measures before Parliament connected with the law. We sincerely trust that they may be discussed in due time, and with due deliberation, and not passed or deferred in a scramble at the close of the Session.

*April 26. 1845.*

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## NEW WORKS LATELY PUBLISHED.

The Law of *Nisi Prius*; comprising the Declarations, Pleadings, and Evidence, in particular Actions, namely, Bills of Exchange, Notes, Cheques, &c. Policies of Insurance in all Cases, and in Ejectment. Vol. ii. By John Frederick Archbold, Esq., Barrister-at-Law. 12mo. 18*s*.

The New Statutes relating to Insolvency and Bankruptcy, 5 & 6 Vict. cap. 116., and 7 & 8 Vict. cc. 96. 70. 111., and the New Rules and Orders, intended as a Supplement to Archbold's Bankrupt Law, with Leases, and a copious Index. By John Flather, Esq., of Lincoln's Inn, Barrister-at-Law. 12mo. 5*s*.

Rules and Orders of the Superior Courts of Common Law, from the commencement of the reign of Wm. IV. to Hilary Term, 8 Vic., with Notes, and a copious Index. By Edward Lawes, Esq., of the Middle Temple, Special Pleader. Royal 12mo. 8*s*.

An Abridgment of the Law of *Nisi Prius*. By Wm. Selwyn, Esq., of Lincoln's Inn, in 2 vols. royal 8vo. Eleventh edition. 2*l*. 10*s*.

*A Practical Treatise on the Laws relating to the Church and the Clergy.* By Henry William Cripps, M.A., of Lincoln's Inn, and the Middle Temple, Barrister-at-Law, and Fellow of the New College, Oxford. 8vo. 1*l.* 5*s.*

*A Selection of Legal Maxims, Classified and Illustrated.* By Herbert Henry Browne, Esq., of the Inner Temple, Barrister-at-Law. 8vo. 15*s.*

*Principles of Conveyancing, designed for the Use of Students, with an Introduction on the Study of that Branch of the Law.* By Charles Watkins Esq., of the Middle Temple, Barrister-at-Law. Ninth edition. Revised and considerably enlarged, by Henry Hopley White, Esq., Barrister-at-Law, of the Middle Temple. 8vo. 18*s.*

*The Law of Judgments and Crown Debts as they affect Real Property.* By Frederick Prideaux, of Lincoln's Inn, Barrister-at-Law. 12mo. 7*s.* Third edition.

*The Statutes 7th and 8th Vict. cc. 96. 70. & 111., and all the new Rules and Orders relating to Bankruptcy and Insolvency, together with the recent Decisions; bringing the Law relating to Bankruptcy and Insolvency down to the present time. Being a Continuation of Montagu and Ayrton's Bankrupt Law, with Forms, and an Index.* By John Herbert Koe, Esq., one of Her Majesty's Counsel, and Samuel Miller, Esq., Barrister-at-Law. 8vo. 5*s.*

*Concise Precedents in Conveyancing, adapted to ordinary Use in small Transactions, with Practical Notes; and a Commentary on the stat. 7 and 8 Vic. cap. 76., intituled An Act to simplify the Transfer of Property.* By George Sivers, Esq., Barrister-at-Law. Royal 8vo. 1*l.* Second edition.

*The General Highway Act, 5 and 6 Wm. IV. cap. 50., and the subsequent Statutes, with copious Notes on the Law of Highways; also, new Forms and general Rules for making and repairing Roads.* 2d edition, corrected and enlarged. By Leonard Shelford, Esq., of the Middle Temple, Barrister-at-Law. 12mo. 7*s.* 6*d.*

*Horæ Juridicæ, or Thoughts on the Character, Aspect, Duties, and present Exigencies of the Profession of the Law.* By W. D. Lewis, of Lincoln's Inn, Barrister-at-Law. 8vo. 2*s.*

*The Code of Practice of the High Court of Chancery, Vol. 2., containing such of the General Orders from the time of Lord Bacon to 1845, inclusive; and such Extracts from the Statutes affecting the Practice of the Court now in use, as have reference to distinct stages of a Suit, classified in the order in which they arise, with a Digest of the Decisions upon them.* By Thomas Kennedy, a Solicitor of the Court. 12mo. 7*s.*

#### NOTE TO ART. I.

Railway legislation has made some progress since our first article in this number was printed. The Lords and Commons have both pretty fully discussed the construction and the progress of the famous Board; and never was body politic so roughly handled. No one, even of the Government, has chosen to step forward in its defence. The task has been left to the two officials, the President and the Vice-President—whose labour has been

considerable and gains trifling. The public feeling has penetrated the walls of Parliament, and no one will venture on so hopeless a speculation as taking a share in the character of the Board, when it is at so great a discount. The absurdity of appointing men to assist the Legislature with their decisions, who are not allowed to examine the evidence the cases rest on, is too glaring to escape the most cursory observation, or be unperceived by the meanest intellect. The equally gross impropriety, to give it the gentlest name of all the members signing, as if their reports were unanimous, when they sometimes are carried by a casting vote—as in the South-eastern Railway, adopted by two against two, and the casting vote of one of the two consentients—has stood assailed and defenceless. The denials given to disclosures and to the speculations thus encouraged have been more loud than convincing; no one denies the large and gainful purchases of the brother of one of the Board; and all feel convinced, in both Houses of Parliament, that such things will be suspected, and may happen, as long as a body of irresponsible and obscure individuals decide in secret, and in secret dispose of millions, without the power of hearing any evidence at all. The defence or extenuation, in the two Houses, has been conducted pretty much on the same scanty materials, but in a somewhat different manner, the good humour and bland demeanor of the able Vice-President forming a remarkable contrast with the somewhat different qualities of his not at all abler chief.

But the oppressions of the Railway system have awakened the serious attention of the community. Case after case has been brought forward of the unbridled insolence of the companies, who, even before obtaining the vast powers of the bills, assume that they are secure of success, and maltreat every landowner whom they do not dread,—only sparing such as have high connexions in Parliament. Threats of passing close to their mansions are used to deter one; plans of actually going through their gardens are brandished in the face of another; this person is told he must accustom himself to live near a railway, as others have done before him; that person is warned that whoever opposes the company, (not yet armed with a bill, but sure of carrying it,) will be worse treated than those who submit. All this, Parliament have for the present disregarded in their resolution to help the Railway fever, instead of trying to abate it, as we humbly take it, was its duty. The consequence is a fearful amount of injustice and oppression, right under cover of laws hastily, crudely made, and an inordinate spirit of speculation, amounting to mere gambling, encouraged over the whole of the community. With the commercial, the pecuniary, the financial, the moral consequences of this, *we have no*

concern. We confine ourselves to the Legal view of the subject; and all that has happened since our first article was prepared, must entirely confirm the view therein taken. Our trust is in the returning good sense of Parliament.

Among those who have distinguished themselves in the discussions of the Commons, may be justly commemorated Mr. G. Banks, Mr. Hawes, and, above all, Lord Howick. His Lordship has displayed his wonted and hereditary spirit, patriotism, and ability most usefully, and it is to be hoped that he will persevere in the same line of watchful observance.

#### NOTE TO ART. VIII.

Whilst these sheets were passing through the Press, we learnt from the Bombay Courier of March 1st, that the Indian government has issued the draft of an intended law, which provides, *inter alia*, for the regulation of marriages among Christians in that country, by placing them on the footing on which marriages stood in England prior to 1753. Hence the editor infers, "that all marriages, whether of European or native Christians, celebrated by dissenting ministers, or even by civil officers, will be valid, to all intents and purposes." If such be the intention of the governor-general and his council, it will clearly be defeated (in this country at least), should the judgment in *Catherwood v. Caslon* remain unimpeached, and no measures be taken for amending the law as to marriages contracted abroad. We understand, however, that a bill has been for some time in preparation, which, if adopted by the legislature, will regulate all such marriages, both retrospectively and prospectively, on sound and rational principles.

#### NOTE TO ART. VII., No. 2., ON DIVORCE.

Since the publication of our last number, a "Reply" has appeared, by Dr. R. Phillimore, to the observations which we felt it our duty to make upon that learned gentleman's pamphlet respecting divorce. We are happy to receive the assurance with which he favours us, that his performance was not a "Collegiate Manifesto," but the individual act of Dr. R. Phillimore. He complains that we have not answered his arguments; but he forgets that we said his pamphlet was "rhetorical and declamatory rather than accurate or argumentative." The learned doctor relied more on stale extracts from other writers than on the original stamina of his own mind. This being the case, we found fault with him for misrepresenting the authorities cited by him. We said that

neither Hume, nor Burke, nor Mackintosh advocated indissolubility. In asserting this, we relied on recollection. The doctor desires us to refresh our memory. We have done so, and find that the doctor was even more mistaken than we had previously imagined. As to Hume, the passage relied upon is merely this: — “The least possibility of a separate interest (in the marriage state) must be the source of endless quarrels and suspicions.” Who doubts it? But does this show that Hume was opposed to divorce for adultery? Yet these words are quoted by Dr. Phillimore in italics. To turn next to Burke. In his first letter on “a Regicide Peace” (Works, vol. viii. p. 174.), we find him commenting on a law passed by the French constituent assembly, allowing divorces “at the mere pleasure of either party, and at a month’s notice.” Upon this the great statesman breaks out into a burst of eloquent and certainly not misplaced indignation. But does he any where say that marriages ought, under all circumstances, to be absolutely indissoluble? If he does, let the passage be produced. Then, with respect to Sir James Mackintosh, any one who looks into his *History of England*<sup>1</sup>, will find that this writer, so far from supporting Dr. R. Phillimore, is positively an advocate for the opinions espoused in the article which has had the misfortune to excite the wrath of Dr. R. Phillimore. Nay, more, even Paley is for divorce in case of adultery by the wife. (Works, vol. i. p. 202.) So that we renew our charge against Dr. R. Phillimore. We say he *has* taken “liberties” with these great names; but he has taken a still greater liberty with the public, by misrepresenting their opinions.

As to the Doctor’s sneer at attorneys, we can only say that we have great pleasure in finding our names and our exertions associated with the interests of that respectable and intelligent body. Far from disclaiming their aid as contributors to this Review, we rejoice to say that we have already received, and are constantly experiencing, the benefit of their support. Indeed, it is by their co-operation that we hope most effectually to advance those great public objects which it is our chief aim to promote.

<sup>1</sup> Vol. II. p. 267.

THE

# LAW REVIEW.

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## ART. I.—MINISTER OF JUSTICE.

AMONG the institutions in which our neighbours of France have a manifest advantage over us, is the great office of superintending the administration of the law, whether as regards the proceedings of Courts, the appointment of legal functionaries, or the improvement of the judicial system and the jurisprudence generally of the State. This, the most important by far of all the branches of government, forms in France one Great Department, and the Minister who presides over it, being exempted himself from judicial functions, is enabled to devote his whole time and his undivided attention to the eminent duties of his office.

But it is not only by preventing interruption to these important labours that the severance of the judicial from the ministerial office is of singular advantage. The duties of the Judge are as much better discharged as those of the Minister, in consequence of this division. Nothing can be more clear than the necessity of the judicial and the executive power in the State being kept apart. This separation is required with a view as much to the purity of the Bench as to the safety of the constitution. Invest a judge with political attributes; how is it possible that he can distribute justice with strict impartiality? Nor is it possible that he can find sufficient time for discharging the duties of the Bench. Neither can he possess his spirit in undisturbed calm, ruffled by no breath of faction, distracted by no anxiety of State

concerns ; and yet the judicial office demands, above all, the unbroken subsistence of that tranquil condition. Then the rights of his fellow-citizens are to be determined by his interposition, and the questions that arise between the subject and the Government must be by him dealt with and decided. How can a member of that Government, its organ in all legal matters, be safely entrusted with the determination of those very controversies in which that Government is one of the conflicting parties ?

If the sovereign and his political representative are excluded from administering justice to their subjects in all European, almost in all civilised countries, it seems a strange anomaly that in any of them his ministers, his political delegates, the depositaries of his whole authority civil and military, should be found clothed with those judicial attributes, of which he himself has long been despoiled. Every reason that makes it improper, and in the highest degree improper, for the prince to sit in judgment upon the lives and fortunes of his subjects, is equally powerful to prohibit the exercise of the same functions by his servants. " There can be no liberty (says Montesquieu, liv. xi. ch. vi.) unless the judicial power is separated from the legislative and the executive. If it be united with the executive, the judge has the power of an oppressor." In the chapter (liv. vi. ch. vi.) entitled " That in a Ministry the Ministers ought not to be Judges," he says, " We see states in which with numberless judges yet the ministers, who could believe it ! must also judge. — " Nothing (says Blackstone, book i. ch. vii.) is more to be avoided in a free constitution, than uniting the provinces of a judge and a minister of state." But the learned commentator, the unbounded panegyrist of our constitution, passes wholly over the glaring exceptions to this rule which our system offers.

If it be wholly improper that any minister of the Crown should exercise judicial functions, it can make no difference in the case that the minister in question is the one charged with superintending the department of public justice. Whether he is to name the magistrates, or the tax-gatherers, or the commanders by sea and land ; whether he is to superintend as representing the sovereign, the jurisprudence, or the financial system, or the military service ; he is equally



a political functionary, equally a delegate of the sovereign authority, equally entrusted with the exercise of the executive power. Indeed, reasons might be assigned why the entrusting one judge with the superintendence of all his brethren, with filling up vacancies in their body, with providing remedies for the defects in the judicial system, is more inconsistent with the public weal than the delegation of the same functions to one not sitting upon the bench.

These principles seem sufficiently obvious, and to rest upon foundations undoubtedly solid. But if there be any State in which we should naturally expect to find them adopted to their full extent, and called in to regulate the whole system of the law, it would surely be England, in whose constitution the utmost jealousy is shown of every political influence, every interference of the Crown with the entire independence of the Bench. Our judges for a century and a half have held or been supposed to hold their places for life. It is above eighty years since the last vestige has been removed of their dependence upon any event but the course of nature, the demise of the Crown no longer being suffered to affect their tenure of office. The decent customs of our Court will not permit them to attend the levees of the prince. They are excluded from all representative seats in the legislature. They are regarded as men set apart for the exercise of an office removed far above all the contentions that agitate restless mortals. They are, as it were, consecrated, and set apart as a peculiar portion of the people, and removed from all secular concerns. Yet in England it does so happen, that the judge of highest rank and most eminent jurisdiction is in practice always one of the most important and active ministers of the Crown, holding his judicial office as well as his political at the mere will and pleasure of the sovereign. It is of course to the Lord Chancellor that we allude. There is a sin against strict principle in one branch of the legislature exercising judicial functions as a court of appeal in the last resort; but custom has greatly lessened the evils that might well be expected to flow from this occurrence, by ordaining that only the law lords should take any part in questions of a judicial kind; lessened, we say, not removed, and cases are not wanting, even in very recent times, to prove how greatly a remedy more

effectual than this custom is wanted, to keep the stream of justice entirely pure, or at least to preserve it from all suspicion of impurity, and give to its virtues the full confidence of the community.

There may seem to be another exception in the judicial powers of the Privy Council, and in the tenure by which Justices of Peace hold their important office. But in practice no mischief whatever arises from either of these sources, because no privy councillor, no magistrate, is ever removed without a conviction which renders him incapable of continuing to act. Substantially they hold their office, like all other Common Law judges, for life or good behaviour.

It is far otherwise with the chief judge in Equity, who, besides, has a most prominent place among the judges of appeal in Common Law questions. The Chancellor is, both in form and in substance, a political personage—an active minister of the Crown—one who partakes in all the party disputes of the day, as well as in all the executive operations of the sovereign's councils. He is also the Minister of Justice. His duty it is to select the judges on each vacancy in the Bench, to superintend the inferior magistrates, to appoint them at his pleasure, and to remove them if he thinks best; but the rule in this respect differing in England and in Ireland, precludes him from removing until there be a conviction in the one country, leaving him a much larger latitude in the other. It is likewise a part of his duty to take especial care of whatever may seem required for removing defects in the judicial system.

The first evil consequence arising from this union of the executive and judicial office regards the risk of partiality. The kind of questions that come before the Chancellor are not so much of a political cast as those with which the judges of the Common Law have to deal; yet it may be doubted if questions approaching to political do not come before him more frequently than before them. Cases of treason, libel, sedition, are more political than any that can occupy an Equity judge; but these are of very rare occurrence in modern times. The cases which touch, though less closely, upon party ground in Courts of Equity, are very far from being of unusual occurrence. The cases of lunatics, where

possessions are large, and influence in proportion great, and the decision of who shall hold the property and exercise the influence, is one of every day's occurrence. The guardianship of infants and the marriage of wards give rise to similar exercise of authority. The staying proceedings in cases involving political considerations is far from unusual. The determining of nice but very important questions, deeply interesting the Crown, and even personally affecting the reigning monarch, becomes frequently the duty of his highest minister, holding at his pleasure by far the most lucrative and most important office in his service. In most of these cases, too, the authority vested in this high functionary is one purely discretionary, and guided by no fixed rules; and in every one of them he decides alone, without any control of a jury, or any concurring voice of brother judges. Nay, as presiding in the House of Lords, he decides on appeal from the Common Law Courts after all the judges and jurors have pronounced their opinion, and he may well happen to sit alone as a law lord in that highest tribunal. It is quite true that the publicity of all judicial proceedings has for the most part prevented gross injustice from being done through the bias thus undoubtedly acting on the Chancellor's mind. But it is well known that one of Lord Eldon's worst decisions — the one in which he has ever since been almost universally held to be in the wrong, related to a case of the late Queen Caroline when Princess of Wales, and was of a nature as highly gratifying to the Prince Regent as it was distasteful and even prejudicial to his royal consort. It is equally certain that one of his successors, when called upon to decide whether the King should receive a very large sum of money, or his tenants of the duchy of Cornwall should retain it, felt so much the impropriety of sitting in judgment on such questions, removable as he was at the pleasure of one of the parties, that he proposed to call in the assistance of unremovable judges, and was only prevented by the united representations of all the parties. In the House of Lords, too, both that Chancellor, and those who preceded, and those who followed him, have more than once been called upon to decide delicate questions of purely political and party complexion, — and who shall pretend to say, that abuse having

always been possible, no abuse has in fact resulted? But the fact of abuse or no abuse is not so material as the high and paramount consideration, that justice should be not only unstained, but unsuspected. On this ground it is, that all the Equity judges have, without any exception, been constituted to hold their places for life, like those of the Common Law. Nay, the Ecclesiastical and Admiralty judges hold their office by the like secure tenure.

It may however be admitted, that the evil arising from partiality, though a flagrant defect in itself, in consequence of the check afforded has been as little likely to occur in practice, — that the other to which we proceed is really of more mischievous tendency, and it is one to which no remedy at all is afforded: we mean the occupation of the minister's time by his judicial duties. The Chancellor cannot possibly be able to perform his important duties as the Minister of Justice; he is far too incessantly occupied as a judge to have the power of acting efficiently as a minister; and his functions as an acting minister, his participation in the acting routine and parliamentary proceedings of the Cabinet, interfere most seriously with his judicial labours. Thus in every manner of way the arrangement is pernicious which unites in one person these different offices. The Judge's labours prevent the Minister from well discharging the duties of his department; the Minister's labours interrupt the duties of the Judge. Were the Minister of Justice only occupied with that department, and also with the general affairs of the executive government, no complaint could arise of the general and special duties interfering one with the other; his cares would only be those of any other minister, each having a laborious office to fulfil in his own department, together with his general duty as a minister. But the Minister of Justice, the Chancellor alone, has those two departments to occupy him; he has, besides, a third — his judicial office, far more laborious than all the rest, quite sufficient to occupy any man's whole time, quite certain to prevent both his ministerial duties from being well performed, while to the imperfect extent of his performing them or attempting to perform them his judicial labours are of necessity occasionally interrupted.

What is the result? Whatever portion of the three duties can be neglected is left undone. A large portion must be

performed. The Judge must of necessity sit in the Court of Chancery, to hear causes — in the House of Lords, to hear appeals; the Cabinet Minister must of necessity attend deliberations of the executive council, and the party chief must attend the debates of the Parliament. There remains the most important of all his duties, but it is not the one that presses the most, and he can postpone it, or discharge it with haste and without care, as he can in great part leave it altogether undone. Of this department it may be said as Dr. Baillie said, when once asked how he could get through so much business as he appeared to do. "Part does itself, part remains undone, some little I do as I can." But there is one difference in the Chancellor's case as Minister of Justice, — no part of his business can do itself; so that much remains undone, and very little is done by him, and that little he can do but very indifferently; yet of all the public business in the State, this of the Minister of Justice is precisely the most momentous to the happiness and stability of the State.

There are some parts which he cannot neglect or even postpone, and they are the parts not least easy or least agreeable to do in some way, though to do them well may be both far less pleasant and far more difficult; these parts, then, are not always well done. We allude especially to the disposal of judicial and other law offices. Nothing can possibly be of more importance to the country than this disposing of places; on it depends the due administration of civil and of criminal justice. The Minister of Justice — if we had any office deserving that name — should be incessant in his examination of all the materials from which to form his judgment; and he should not be guided by common fame, or by the opinion of even well-informed men in the profession, considering how constantly partiality blinds men both for and against candidates. Nor ought he even to be swayed by the consideration of professional success, nor by the actual display of capacity in the vocation of an advocate. All these things are much to be considered — all must be well weighed. But a personal knowledge should enter also into the account, and a rigorous inquiry, not confined to generals, but going into much detail, should be instituted among men, judges included, of various classes and unlike habits of think-

ing and of judging. This is not by any means the course which our chancellors take; and the short time which elapses between a vacancy and an appointment is a proof that these over-worked functionaries do not give themselves the opportunity to pursue any such course.

But imperfectly as this function of a Minister of Justice may be performed, that very great benefit accrues from its exercise is certain. The Chancellor is responsible to the country, and, above all, to a watchful and jealous profession, for any appointment which he makes to the Bench; he names all the judges of his own authority, without any interference of his colleagues; and thus there is both the ear closed against political intrigues, and an impossibility of any very unfit judge being appointed from personal favour. Yet so imperfect is our system, so entirely deficient indeed in the office of a Minister of Justice, that many most important judicial appointments are placed wholly beyond his patronage or direct control. He names to none of the Scotch judgeships; thirteen in number of the superior Courts, the Session and Justiciary; thirty-two in number of the local Courts, the sheriffs of counties, who are the judges in all but a few cases, and the judges to any amount of interest all over Scotland. Nor are the judicial appointments in the Colonies at all under his authority. All the Colonial judges and all the Indian judges are beyond the limits of his province. Who appoints to these numerous and most important places? The Secretary of State for the Home Department appoints all the forty-three judges of Scotland. The Colonial Secretary names those of the Colonies. The Board of Control and the Court of Directors name to the Indian Bench. Can such appointments possibly be left in worse hands? What can a Secretary of State or President of the India Board know of lawyers and their qualifications? What security can they have against the access of private solicitation, the influence of personal favour, the movements of party, the operation of Court favour? We desire to make no invidious allusions; and the services of the late Lord Melville to the country were most valuable during the long and laborious public life of that able and distinguished person. But he had long quitted the Bar when he became Minister for Scotland as Secretary

of State; and he no longer acted in the face of the legal profession under all the responsibility which that superintendence implies. Hence it inevitably followed that many political appointments were made to the Bench, and that all judicial patronage was bestowed, even when fit men were selected, upon one party at the Scotch Bar, the adherents of the Minister. Sir Robert Peel, to his infinite honour, broke through this practice, became inveterate under a succession of former Secretaries of State, and he chose judges among the ablest advocates, without the least regard to party. But he was not a lawyer himself, and both he and those who have succeeded him laboured under the unavoidable ignorance of men's qualifications, as well as acted without due responsibility in their nominations. We do not say that men unfit for those high stations have been selected, but we affirm, without any hesitation, that the country has not always had the benefit of the best choice which could be made. India and the Colonies are more distant scenes for the disposition of patronage, and more out of sight than Scotland. Hence instances of very unfit appointments could easily be produced from these vast settlements; and particularly the near relationship of the Chairs speaks most plainly in filling legal stations of first-rate importance in our East Indian Presidencies.

All this shows how lamentably deficient is the department which we liken to the French Ministry of Justice: it proves that there is in reality no such minister in this country. The Chancellor's patronage of the English Bench appears rather to be an accident than any regular incident to his high office. Indeed, even in naming to the Bench he is interfered with, though not directly and immediately. It is understood that, beside the places of chiefs in the Queen's Bench and Common Pleas, which are Cabinet appointments, the Attorney and Solicitor-General are named by the Ministers at large. Now why should this be? If it is said that the appointment of Crown lawyers — of advocates for the public or the prince — may naturally be a matter for the consideration of the Executive Government at large, we reply that so is the selection of Colonial governors, and yet the Colonial Secretary names these. But again; there would be less reason to

complain of the Chancellor's appointment to the places of Crown lawyers being interfered with by his political colleagues, were it not an understood thing that an Attorney or even a Solicitor-General has the right to ascend the Bench upon any vacancy. Then, how can the Chancellor be said to appoint all Judges, if the First Lord of the Treasury, or peradventure the Secretary of the Treasury, for party purposes has swayed the appointment of those officers, whose right it is to mount the Bench at their pleasure. What is the consequence? Sir Samuel Shepherd was made Attorney-General. He was an excellent lawyer, but he happened, unfortunately, to be deaf. It was impossible to make him a Judge in England. Therefore he was made Chief Baron in Scotland, where we presume a Judge is not expected to hear either side. His appointment, moreover, prevented the abolition of the useless Court of Exchequer and its five Barons. So Sir William Garrow was made Attorney-General, and he, though not at all deaf, and though a very great advocate, was really no lawyer at all. Besides, he was a useless Attorney-General; therefore to get rid of him he was requested civilly but significantly to exercise his right of being made a judge, and a judge he was made accordingly. Had there been a Minister of Justice, endowed with the undivided patronage of the judicial department, these things, and others of a like kind, never could have happened. We should not have seen Lord Eldon displaying the bad selection which his colleagues had made of an Attorney-General, by adjourning an argument in which the Crown was interested, till the Attorney-General could appear before the House of Lords, and there read a paper by way of supporting his client's case, but misreading the law citations, and entertaining his audience with "Cro. Jac." and "3 Lev." and "1 Sid." We should not have next seen him promote to the Bench the same eminently learned person, simply, because being too ignorant to be one of the King's Advocates, he was not disqualified to be one of the King's Judges.

We have very great respect, in fine, for such able and excellent individuals as Lord Ripon, Lord Stanley, Sir James Graham. In better hands or in safer hands we do not think the affairs of India, of the Colonies, of the Home Depart-



ment could be placed. But it is no charge against them to suggest, that nothing short of a miracle could make them lawyers, give them a power to weigh the merits of the English and the Scotch Bar, and, above all, place them in such relation with Westminster Hall, both Bar and Bench, as to secure the country against their committing grievous mistakes in the selection of Scotch and of Colonial judges. Our charge is against the system; and we impeach it of defect, and of vice as well as of defect. We charge it with sins of commission as well as of omission; and the grievance is, that it is a system so bad that not one, even such admirable men as we have named, can administer it with safety to the State.

The selection of judges is the most important, but it is not the only office of a Minister of Justice. The superintendence of the judicial department in general should also be committed to him. Whenever there is any defect in the arrangements made by the judges in distributing their duties, it is his province to interpose; and this all the rather that these high functionaries may oftentimes consult their own convenience rather than that of the suitors. We respect, nay, reverence, these venerable magistrates; but we know that they are men, and we therefore feel assured that they will err if not superintended and controlled. Let us take a few instances in which that supervision seems to have been required.

The distribution of circuit business has frequently been complained of. In one case we remember so short a time being allowed for each place, because a judge desired to end his labours and go abroad, that the trial of causes was most improperly hurried over, and remanets needlessly made to next assizes. In the arrangement of the northern circuit remanets were always made in the first assize town, and therefore Lancaster and York were alternately chosen as the last place. Learned Judges went so constantly on particular circuits that they became acquainted with individual suitors and practitioners more than was fitting. Their motives for this constancy of predilection was avowedly the expectation of places within their gift falling vacant. The vast extent of the northern circuit, twice as great as any other, four or five

times as great as the Norfolk, had long been complained of. Can any one doubt that the measure, so tardily discussed, and not yet taken in 1845, to remedy this great evil, would twenty or thirty years ago have been adopted had there been a Minister of Justice? The constitution of the Great Central Court for London and the neighbourhood, requires two of the judges to sit there. This, however, only happens for two or three days each sitting. If it be said that the judges are too few in number, we make answer that nothing is more likely to be found on inquiry. But a Minister of Justice would have taken care to propound some measure for supplying this want, and he assuredly would never have suffered the representations of the Bench to impede his course if he found the arrears of business in the King's Bench such as they have long been.

But other measures of improvement in the judicial department would not fail to have been propounded and carried had we possessed such a high functionary. Would the monopoly of the Serjeants in the Common Pleas have stood so many years before him? This was put an end to, in 1833, by a royal warrant. The Coif combined and agitated (to use the modish phrase). They produced cases and other authorities which made it very doubtful if the Crown had the power of opening that Court to all the Bar. The warrant was in consequence revoked, and the monopoly was restored, with a trivial qualification. A Minister of Justice would have carried, by Act of Parliament, that which the Royal authority appeared unable to effect.

As the constitution is now in practice framed, no abuse is corrected or defect supplied in our judicial department, by far the most important of all, until the members of the profession find it for their own interest to obtain a change, or find it wholly impossible to withstand any longer the general complaint: until the Judges, and the Bar, and the attornies are all satisfied that they are injured by the grievance, or until they all feel convinced that they can no longer resist the change demanded on every side, there is no chance of the public interest being consulted. The consequence, then, of leaving the reformation of abuses to the exertions of that body which may have no interest adverse to the abuses, or

which may even have a direct interest in their continuance, is inevitably to postpone many needful improvements in the system, and to prevent many more from even being made at all. The public interest imperatively demands that some authority should be placed between the country and the profession. That authority is the power and the influence of a Minister of Justice.

Need we remind the reader how inevitably men become blind to defects which they daily see, in a system above all to which themselves belong, and which themselves administer. This must be the case even if they have no selfish interest to bias their judgment or obscure their vision. But the truth unfortunately is, that a very large proportion of its defects in this, the judicial system, as in all others, arises from the particular interests of one class being at variance with those of all the other classes in the community. What was often said of the great error in the West Indian system, is a maxim of unusual application,—"Suffer not the masters to make laws for regulating their own rights, and governing their own conduct towards their slaves." But generally—Suffer not those who compose any one class in the State to make the laws which regulate that class in its rights and in its conduct. Let not the community wait until abuse shall be corrected by the individuals who either profit by it, or through long habit have become blind to its existence, and callous to its consequences.

Besides, is the division of labour to go for nothing? Will not more chances of improvement be afforded when there is a great department charged with the spying out of defects, wholly concerned in the operation of those defects, and bound by its duty towards the public to attempt constantly the removal of them, and the perfection of the judicial system. The numerous important amendments introduced into the law among our neighbours of France can be ascribed to nothing more certainly than the existence of a minister charged with the judicial department. The unfortunate choice of the person who has since 1840 filled the important office, has no doubt checked almost all progress during that period, and even in some great instances occasioned a retrograde movement in the system. We cannot imagine so costly a sacrifice being

much longer continued—a sacrifice wholly made to the Jesuit party. It is altogether unworthy such men as preside over the French government.

The truth is, that both in France and England, but especially in England, the law is in a kind of transition state. More important changes have been made in it during the last fifteen years than in the two centuries that preceded. The obstinate resistance to all amendment, which had kept down improvement of every kind for so long a period, made the rush more rapid and more sweeping of the flood that was let in as soon as the old stand-still and hold-fast principle was overthrown by the spirit of the age, in the manner which we described at the commencement of our labours in this Journal. The change is still going on, and it is quite manifest that the Government of the country cannot, nor ought it to remain, a passive spectator. It is by no means necessary—it is not even at all desirable, that the ministers should themselves originate all the measures of salutary reformation which the defects of the system and the altered condition of society require. But neither is it necessary or desirable that they should remain unconcerned spectators of the labours of individuals. It is the bounden duty of those who are entrusted with the executive powers of the State to exercise their just influence on all propositions for the alteration of the law which may be made in any quarter, to check those which are hurtful, to further those which are beneficial. It is also their duty to propound themselves such salutary improvements as no individual authorities are likely either well to propose or effectually to promote. A Minister of Justice is essentially necessary for performing this most important office, and at no time was the aid and superintendence of such a functionary more likely to prove of public advantage. This appointment would be hailed with great satisfaction by the legal profession, and it is hard to say which class of men would more rejoice in the prospect of his countenance and protection,—the reformers who desire only to see safe and well-considered changes effected, or those monarchs of the Bench and the Bar whom “fear of change perplexes,” and who would derive ample security from the deliberation and the firmness of that great officer of state.

It may now be expected that we should consider in what manner this department ought to be constituted and arranged. Nor does the difficulty appear great of coming to a right understanding on this important matter.

In the first place, it seems by no means essential that all judicial functions should in the first instance be taken from this minister. He ought, for the obvious reasons which have been given above, by no means to sit alone in any Court of high jurisdiction. But he may, at least until we get more fully into the new system, be suffered to sit with others, as in the Privy Council, where he might fill the place of President, and thus save all additional salary to the State, besides bearing a name and title already known to the constitution. This will be advantageous, as clothing him with a rank and authority which cannot all at once be created by the provisions of a new statute.

Secondly, there seems no reason why he should not preside in the House of Lords, with power to call in the aid of such other law lords as the House may at any time possess among its members, or if there should happen to be none, he might have power to call in the aid of the Chief Judges in Law and Equity, and the heads of the Ecclesiastical and Admiralty Courts. But it seems highly improper that the Chief Justice of the King's Bench should ever be a commoner. The reward of the peerage ought never to be held out as attainable by that eminent judicial functionary, liable to be bestowed or withheld according as his conduct may be satisfactory or displeasing to the Court, or to the minister of the day.

Thirdly, the Chancellor, without the name, with a reduced salary and an entire severance of the ministerial duties, should be appointed for life, and be the Chief Judge in Equity. A peerage always accompanying his office would make him a useful aid to the President of the Council, or the Chancellor as he might still be called, sitting as Speaker of the House of Lords.

Lastly, this officer, being a minister, though clothed with certain judicial functions, would of course hold his office like his colleagues, and be removable at the pleasure of the Crown. The House of Lords would thus continue to have a Speaker as at present, not of their own choice like the Speaker of the

Commons House, but appointed by the Sovereign, and hence no change whatever would be made in the constitution of Parliament, or in the frame of the Government, nor would the great office of Chancellor be lost to the Constitution and the Bar.

It is necessary to add that the Minister of Justice, by whatever title he might be known, would have the undivided department of superintending the whole judicial system of the country, both at home and abroad. He would name, that is, recommend to the Crown, all the judges, both chiefs and puisne, in England and in the colonies. He would also recommend the Irish judges, while the Irish Chancellor, like the English, should hold his office for life. The other functions of the Minister of Justice have been already sufficiently described in the foregoing statement of the reasons for establishing such a department.

But it is very possible that the appointment of a Minister of Justice might in a short time tend to a further change, and that the Chief Judge in Equity might preside both in the Lords and in the Privy Council. The only remaining portion of the present anomaly would then be removed, and no one of the greater judicial offices would be held otherwise than for life or good behaviour. But so little that is important in this anomaly would be left by the Minister of Justice acting as presiding judge when others not removable were found with him in the Privy Council and in the Lords, that no practical harm could arise from the arrangement suggested before the new system assumed its ultimate and more perfect form. Besides, it is not to be denied that great benefit would arise from the Minister of Justice, who has to select the persons fittest for judicial situations, having an opportunity of communicating with the Bar personally, as he would by hearing the advocates address the Court in the discharge of their duty.

But there is another and a most important branch of the public business which may most appropriately be placed under this department. The superintending of Government Bills on all subjects, we have more than once had occasion to show, ought to be confided to a Board exclusively framed for this purpose. Nothing can be more inconvenient than the present practice. Bills are drawn, and are presented from various departments, each preparing its own drafts without

any communication to any other, and all being carried through Parliament without the least controul from any general supervision, because all are carried through by the members who represent the several departments. Bills affecting the naval service are prepared at the Admiralty, and carried through by the Lord or the Secretary who happens to have charge of the Admiralty business in the Lower House, and by the First Lord in the Peers, or by nobody at all if the First Lord be a commoner. Bills affecting the army are in like manner prepared at the Horse Guards, and carried through the Commons by the Secretary at War, through the Lords by the Commander-in-chief, if a Peer and a man of business, if not, by any one who chooses to be present at their successive stages. The Secretary at War and the Secretary of the Admiralty never communicate together on the principle or on the details of their several measures, how nearly soever their provisions may touch in principle or in detail. In like manner the Colonial Bills are kept apart from those that proceed from the Home Department, and the Treasury Bills are as insulated as the rest. The original concoction of these several streams of legislation is confined to the several fountains from whence they take their rise, and as each source is wholly unconnected with all the others, so each channel in which their various waters flow through Parliament is entirely kept apart from the rest. But after all it is the same material of which the whole are composed ; it is only new law that is mixed or conveyed, and the separation continues not a moment after the bills become statutes. Then they all are consigned to the interpretation and execution of the same tribunals, and their endless inconsistencies and discrepancies are at once perceived. Nothing can be more perplexing to the Judges than the confusion in which they are thus bewildered. They find the same things said in various language ; they find different things expressed in the same terms ; they see principles adopted in one act that are repudiated in another ; they perceive that the very reasons urged to show the lawgiver's intention in one case to be of one kind prove him in another to have had a different, nay, an opposite view. In many cases the known language of the law is disregarded ; in still more the known principles and

maxims of the law are set at nought ; in not a few the meaning of the legislature is so wrapt up in a phraseology which no man's wit can pierce through, so as to reach it like carefully hidden ore, but of which the value is far more questionable than the concealment. Not seldom the words of former acts are borrowed, but applied to cases to which they are wholly inapplicable. Not seldom reference is made to things existing in former acts, but not transferred to the new ones. The scissors are very frequently the instruments used in framing these statutes, and were the wit of the Judge as sharp as they, no possibility exists of finding a sense where none whatever is to be found.

When we reflect that there are above a hundred public acts passed every session, and twice as many private ones, surely we may well complain that there should be no more pains bestowed upon their composition. Surely the Judges may well complain that they should be called upon daily to explain and to apply such provisions. Surely the public may well complain that the time of the Courts should be so unprofitably wasted, when a slight degree of care, a very easy arrangement, might so easily remove this cause of vexation and delay in our judicial proceedings. But the worst of it is that in many cases the acts fail to accomplish their objects, sometimes by failing to express what the legislature intended, sometimes when the intention is expressed by their provisions being found to oppose and conflict with and counteract each other. There only wants, in order effectually to remedy the greater part of this crying evil, the appointment of a Board to revise all Bills before they are presented to either House of Parliament, and to consider all changes or additions proposed in their progress. The Government Bills would naturally form the bulk of those submitted to this scrutiny, but any member of Parliament might be allowed to avail himself of the Board's assistance.<sup>1</sup> At the head of this Board ought to be placed beyond all doubt the Minister of Justice. Its operations would thus be naturally connected with the Government, and his care and superintendence would be of the greatest importance.

<sup>1</sup> See as to this subject 1 L. R. 134.



## ART. II. — HERIOTS.

It is not our intention in the present article to attempt to give a statement of the law as to heriots. We are desirous only of calling attention to certain points connected with them, some of which do not appear to be generally understood, and to offer some observations tending to the abolition of what we think must be generally considered as a partial, absurd, and oppressive impost.

The origin of heriots is perhaps more obscure than any other existing incident of tenure, and has been traced up by different writers to very different parents. A heriot is now indeed a brat which is laid to the door of many fathers, without getting a willing acknowledgment from any. "Heriots," say the Real Property Commissioners<sup>1</sup>, "are a reproach to the law of England, and must be considered as a remnant of that barbarous state of society which existed *at their introduction by the Danes*." Perfectly agreeing with the learned Commissioners as to heriots being a reproach to the law, we are induced to differ from them as to their having been introduced by the Danes, although we are aware that this opinion has also the sanction of Blackstone<sup>2</sup>, who was probably followed in this by the learned Commissioners. But the heriot certainly existed at a much older period of our history. There can be no doubt that heriots were a part of the military system, and it seems now to be the better opinion that this was not an invention of the barbarians, but derived by them from the Romans. The theory broached by Robertson, and followed on this subject by Blackstone, appears to be incorrect. According to the former, "The king or general who led the warlike people forth to conquest, and continued still to be the head of the colony, had of course the largest portion allotted to him. Having thus acquired the means of rewarding ser-

<sup>1</sup> Third Report, p. 19.

<sup>2</sup> 2 Bl. Com. 422. This idea probably arose from the declaratory statute of Canute on the subject hereafter noticed. See *post*, p. 267.

vices, as well as of gaining new adherents, he parcelled out his lands with this view. His chief officers imitated the example of their sovereign, and in distributing portions of the land amongst their dependants, annexed the same conditions to their grants.”<sup>1</sup> But later writers give us a good reason for supposing that this is incorrect. Lands were granted by Alexander Severus, as noticed by Blackstone himself<sup>2</sup>, and afterwards by Probus, to the Limitanean or Ripuarian soldiers, upon conditions well described as containing the germ of the feudal tenure of the middle ages, and which appear to have been adopted as the basis of the defensive system of Europe. It is not necessary for us to enlarge on this subject<sup>3</sup>; indeed, we only notice it because most of the text books familiar in the profession appear to give a mistaken account of the origin of the feudal tenure.

But heriots may be traced to a much earlier date than even this. They appear to have existed, although under different names, among the Roman institutions even of the the Republic, and in the first instance not to have been connected with the tenure of land, but to have been attached only to persons. They were, in fact, part of the system of *patron* and *client*, familiar to that people.

Lord Wynford seems to have had the idea that heriots were not originally connected with tenure present to his mind when he decided the case of *Garland v. Jekyll*.<sup>4</sup> “It is probable,” said Best, C. J., “though this is mere con-

<sup>1</sup> Robertson, Charles V., sect. I. p. 25.

<sup>2</sup> 2 Bl. Com. 47., who says that the Emperor “took the hint” from the barbarians, but surely the reverse seems more probable.

<sup>3</sup> The reader will find much information on this subject in Sir F. Palgrave's History of the English Commonwealth, who shows that the theory of Robertson has long been exploded by the more enlightened European writers on this subject. See 1 Palgrave, 496. Dr. Whewell, also, in his recent work, which we hope at a future time to examine, says, “The feudal system borrowed its more substantial elements, the tenure of land by military service, from the Roman empire. Even while the empire was only commencing, Sylla and Augustus assigned lands to their veterans; and a little later lands were granted to the Limitanean or Ripuarian soldiery, on condition of defending the boundaries of the empire. \* \* The lands thus possessed by military service were termed *benefices* (*beneficia*), and afterwards *fiefs* (*feuds*), by the barbarians, who received lands from the Roman rulers on the like conditions.” Whewell's Elements of Morality, vol. ii. p. 964.

<sup>4</sup> 2 Bing. 292., as to which see *post*, p. 270.

jecture, for the history of heriots is so obscure that it is impossible to ascertain how they originated—it is probable that heriots were originally nothing more than the gift which, in a rude state of society, a person in an inferior situation of life, on approaching one of a superior situation always offered.<sup>1</sup> We know that in many countries where knowledge and civilization have not made the progress they have in this happy country, an inferior person cannot approach a superior without the offer of a present. It has occurred to us that heriots were a species of tribute the tenant offered to the lord at the time he approached him, in order to secure his protection and to pray of the lord to confer on him the interest which had been determined by the decease of the former tenant.”

This is not quite correct; because the heriot is payable, not by the next tenant or heir of the last tenant, but by the executors of the last tenant out of his personal estate. But we think Lord Wynford was right in his conjecture as to the heriot being originally a species of tribute payable by the tenant to the lord on the death of the former for his protection and countenance. According to the opinion of Mr. Spence, a part of whose forthcoming work has been placed at our disposal with his accustomed liberality, the heriot was originally payable only in respect of the personal relation of the patron or lord, and vassal or man, and whether the vassal held land or not. But as regards those who held land of their lord, a variation took place shortly before or at the Norman Conquest, when the payment of heriots became connected with the land.

Mr. Hallam, without any particular allusion to heriots, says, “There are vestiges of a very universal custom distinguishable from the feudal tenure of land, though so analogous to it, that it seems to have nearly escaped the notice of antiquaries. From this silence of other writers, and the great obscurity of the subject, I am almost afraid to notice what several passages in ancient laws and instruments concur to prove, that besides the relation established between lord and

<sup>1</sup> This is still the invariable custom in India, (where, by the bye, the feudal system is yet to be found among the natives;) and it exists to some extent in France.

vassal by beneficiary grants, there was another species more personal and more closely resembling that of patron and client in the Roman republic. This was usually called *commendation*, and appears to have been founded on two very general principles, both of which the distracted state of society inculcated. The weak needed the protection of the powerful; and the government needed some security for public order.”<sup>1</sup>

Whether this institution was borrowed from the Romans and was adopted by all those nations whom we are pleased to term Barbarian, or whether it existed among them before their intercourse with the Romans, we shall not now stop further to inquire. It is quite certain that heriots existed among the Anglo-Saxons, as is fully shown by Sir F. Palgrave.<sup>2</sup>

Upon the death of any landholder, the sovereign or the lord was entitled to claim the Heregeot<sup>3</sup> or Heriot. The ex-

<sup>1</sup> 1 Hallam's Middle Ages, p. 114. Ed. 8.

Sir Thomas Smith, who wrote in the time of Elizabeth, says: “Ye see that where the persons be free and their bodies at full libertie and *maxime ingenui*; yet by annexing a condition to the law, their is meanes to bring the owners and possessors thereof into a certain servitude, or rather liberty. Thus, the tenants, beside paying the rent accustomed, shall owe to the lord a certain faith, duty, trust, obedience, and, as we term it (certain services), as *libertus* or *cliens patronus*: which, because it doth not consist in the persons (for the respect in them doth not make them bond, but the land and occupation thereof), is more properly expressed in calling the one tenant, the other lord of the fee, than either *libertus* or *cliens* can doe the one or *patronus* the other: for those words touch rather the persons and the office and duty between them than the possessions: but in one case leaving the possession and land, all the obligation of servitude and service is gone.” Commonwealth, book iii. chap. 10.

<sup>2</sup> Hist. of English Commonwealth, vol. 2. p. cclxii.—v. Heriots are also mentioned in England as early as the time of Edgar. Hallam's Middle Ages, vol. ii. 416.; citing Selden's Works, vol. ii. p. 1620.

<sup>3</sup> Here-geat (*apparatus bellicus*, &c., see Willes, 194.) Under the name of Herwede, Heergewette, Herwad, Hergewæde and Hergerette, these gifts or payments were equally known to the German law. Palgrave, cclxii. Lord Coke derives heriot from “*here*,” lord, and “*geat*,” beste; i. e. the lord's beste. Co. Litt. 185 b.

In Mr. Thorpe's very recent translation of Dr. Lappenburg's England under the Saxon Kings we find — “Among other German tribes the heriot (heergewite) at an earlier period fell to him who inherited the land or fief of the ancestor; and in England also at a later period the payment or redemption on the death of the last possessor was, with a total disregard of the original object, converted into a pecuniary burden on the successor on taking possession of the estate,” vol. ii. p. 314.

tent of these payments, which in the laws of William were termed Reliefs, appear distinctly from the general declaratory statutes of the Dane. Eight horses, four saddled and four unsaddled; four helmets, four coats of mail, eight spears, eight shields, four swords, and two hundred *mancusas* of gold were to be tendered by the "heirs of the "Earl." From the heirs of the King's Thane (the Baron of the Norman text) four horses, two saddled and two unsaddled, two swords, four spears, four shields, a helmet, a coat of mail, and fifty *mancusas* of gold. The reliefs due from the inferior Thaness (the vavassours of William's laws) differed in the three great divisions of the empire. In East Anglia and Mercia each paid two pounds. In Wessex no money is mentioned as due from the Thane, but his horse, his harness, his weapons, his collar of Estate became the property of the king. In "Dane Lage" the rate was more burdensome. The heriot of the Thane or Baron, who had socne or jurisdiction, was four pounds. From the Lagemen or territorial magistrates of Cambridge as large a relief was exacted as from the Thane, together with a palfrey, and the arms of one knight or soldier. Lastly, the Villein was to render his relief or heriot, and the best beast which he possessed, horse, ox, or cow, was to be presented to the lord, being, as is familiarly known, the heriot generally due by the copyholder of the present day.

The general outline of the system was varied by local customs, some of which are noticed in Domesday. The representative of the Berkshire Thane was bound to present the hawks and hounds of the deceased to the king. In Nottinghamshire, if a Thane held above eight manors, the sum of eight pounds was paid to the king in lieu of any relief. If he held under that number, three marks of silver were paid to the Vicecomes. The same custom prevailed in Yorkshire, so that in a considerable portion of the Dane lage, the general rate was increased by the usages of the country; and the freeman holding of the great lordship of Derby paid forty shillings if he wished to have his father's lands. In Kent the king had relief from all the Allodarii, excepting certain persons, upon whose death the relief belonged to those who had the "sac and soke" of these lands.

The foregoing instances are sufficient to show that the

heriot or relief, for in the early period of our history they cannot be distinguished from each other, was due not only from lands of villein tenure or copyholds, but was due from all other lands; and thus it is that they are found existing at the present day throughout the county of Kent, where scarcely any land of base tenure has ever been known.

We have been thus particular on this point because many familiar authorities incorrectly<sup>1</sup> treat heriots as incidents of copyholds, whereas they merely affected copyholds as they did all other lands, although it is quite true that they are to be found at the present day chiefly, although by no means universally, connected with lands of this tenure.

Heriots, then, as we think we have proved, have an origin widely different from that of the other copyhold incidents, and are indeed entirely distinct from them.<sup>2</sup> This leads us to enquire whether they might not be dealt with separately as affecting both copyholds and freeholds. But let us first notice some

<sup>1</sup> Thus Blackstone, vol. ii. p. 98., mentions heriots among the fruits and appendages of a copyhold tenure; and adds, "This is plainly a relic of villein tenure." Mr. Serjeant Scriven, usually well informed on this subject, also says, "The service is the badge of the feudal system, and may at the present day be deemed the most, if not the only obnoxious part of copyhold tenure; but the existence of this service is very limited, and it attaches partially on freehold as well as copyhold estates; *such freehold estates, however, being for the most part enfranchised copyholds.*" 1 Scriv. Cop. 437. We have shown in the text that this is not correct. Mr. Coventry, also, in his edition of "Watkins on Copyholds," vol. ii. p. 101., appears to us to have fallen into a similar error; and Mr. Watkins himself also says "that the heriot of the villein ceorl, or husbandman, either consisted of some beast used for the purposes of agriculture, or which formed part of his stock, or of some inanimate goods; and that the villein heriot is the only species of heriot now remaining among us." 2 Walk. cap. [138]. This is not correct in our opinion. The beast of the freeman as well as of the villein was forfeited as a heriot. This is distinctly laid down by Bracton as follows:—

Est quidem alia præstatio quæ nominatur Herietum et quæ nullam comparisonem habeat ad releviam; sed ubi tenens *liber vel servus* in morte sua respicit dominum suum de quo tenuerit, respicit de *meliori averio suo* vel de secundo meliori secundum diversa locorum consuetudinem, quæ quidem præstatio magis fit de gratia quæ de jure et quæ hereditatem non contingit. Bracton, lib. 2. c. 36. fol. 86 a.

<sup>2</sup> As a further proof of this we may observe that in the statute for abolishing the military tenure, 12 Car. 2. c. 24., copyholds and heriots are provided for by different sections. Thus, by sect. 5., heriots are expressly exempted from the operation of the Act, and by sect. 7., nothing in the Act is to alter tenures by copy of court-roll, or any services incident thereto.

of the rules affecting this burden on land which, we apprehend, has been long in disfavour with the law.<sup>1</sup>

The most usual thing rendered as a heriot is that of the best animal of which the tenant died possessed. Which this best animal is, in case the tenant dies possessed of several, is to be ascertained by the lord, for he may take which he pleases as such; but if he seize the one which in reality is the worst, he must be content, for it will be his own folly to make such a choice, and immediately on his election the property shall vest in him.<sup>2</sup> This rule frequently leads to some strange dealing with the animals chosen. We have heard of a well-known horse dealer having on his death six of his best horses seized, but the lord was imprudent enough to leave them in the hands of the son of the dealer, who (as knowing as the father) found means to lame them all, and was then able to compound for their ransom on much better terms.

The heriot must also be the best beast of the tenant at the time of his death or alienation; for if the property in the beast was not at that time in the tenant, the lord can have no title to it.<sup>3</sup> Under this rule the payment is frequently evaded, as the tenant takes care to get rid of any beast worth having previously to his death.

When the heriot is of the best dead or inanimate goods, a jewel, picture, or piece of plate, may be taken.<sup>4</sup> Under this rule the Pigot diamond, which was<sup>5</sup>, we believe, the third diamond in the world, was once in great jeopardy. It had passed into the hands of a tenant of the manor of Bolton, in Cumberland, who was a pawnbroker carrying on his busi-

<sup>1</sup> The obligations of copyholders to lawyers have been thus justly and eloquently expressed by Lord Wynford: — "Whatever the situation of copyholders might have been in the early part of our history, custom has now confirmed and established the rights of the tenant. This alteration has been brought about by no statute: the statutes to which we refer with so much satisfaction have only secured the rights of men already free. It is to lawyers in Westminster Hall, and I speak it with pride, that slaves (for such was the state of men in pure villenage) are indebted for the permanency of their property, and for that weight in society which permanency in property has conferred upon them." 2 Bing. 292.

<sup>2</sup> 2 Watk. Cop. 106.

<sup>3</sup> Bro. Har. 8. Kitch. 135 b.

<sup>4</sup> 2 Bla. Com. 424.

<sup>5</sup> This diamond, we believe, no longer exists entire, it having been found more advantageous to cut it up.

ness in London, and died while it was in his possession. Although the lord forebore in this instance to avail himself of the accident, yet it singularly illustrates the hardships to which the burden of heriots is exposed.

Another absurd rule connected with heriots was, that if my tenant who holds of me by a heriot, alien parcel of the land to another, each of the parcels was chargeable to me with a heriot, for it is entire; and if the tenant purchased the land again, yet I might still have claimed a heriot for each portion, and this, though there were twenty or one hundred portions. This is laid down in *Fitz. Ab. tit. Heriot*, pl. 1., and was settled, according to Lord Ellenborough, as long ago as the time of Edw. 3., and was held to be law by that eminent Judge.<sup>1</sup> Lord Wynford, however, had the boldness, in *Garland v. Jekyll*, contrary in our opinion to the precedents, to overrule these cases, and to hold that although several heriots become due on a division of land among the several owners, yet, if the lands unite again in a single owner, only one heriot is due.<sup>2</sup> The same rule has been more recently recognised by the Court of King's Bench.<sup>3</sup>

The circumstances in the case of *Garland v. Jekyll* will not be uninteresting. Sir T. C. Bunbury died in 1821, and was the owner of divers horses, twenty-six of which were at Barton, in Suffolk. The plaintiff claimed twenty-two of the

<sup>1</sup> *Attree v. Scutt*, 6 East, 475. This rule reminds us of an Eastern story, for its absurdity can only be paralleled by fiction. A certain pilgrim, travelling the deserts, and parched with thirst, perceived a reed lying in his path, and almost in despair addressed it. Now, the reed was an enchanter, and instantly complied with the pilgrim's wish, and brought him a bucket of water; but after this was finished the reed brought another and another and another, till the poor pilgrim was nearly washed away. In despair he smote the reed, and divided it into two, but soon found his persecutors were doubled: for, behold! there were two reeds bearing two buckets!

<sup>2</sup> *Garland v. Jekyll*, 2 Bing., 273. The learned Judge amused himself very much with a citation from *Fitzherbert*, which was relied on as an authority. His description of the two judges "Wyl." and "Shard" is very entertaining, and his criticism on Lord Ellenborough's judgment is acute. We have no doubt, however, that in law Lord Ellenborough was as right as he was wrong in common sense and justice, which Lord Wynford endeavoured to import into the case. We may say of him as he says of *Fitzherbert*—"Fitzherbert's abridgment is the compilation of a learned judge, but even learned judges may sometimes make mistakes."

<sup>3</sup> *Holloway and another v. Berkeley*, 6 B & C. 2. S. C. 9 D & R. 83.



best beasts of Sir T. C. Bunbury as heriots, and sent his bailiff to Barton to take an account of the horses of Sir T. C. Bunbury, and the groom delivered to him the names of twenty-five horses which were there, and of others which were at Newmarket. By agreement between the plaintiff and the executors of Sir T. C. B., twenty-two of the horses which were at Barton were sold at Tattersall's. Among those sold we believe the well-known race-horse Smolensko was one.<sup>1</sup>

On the other hand, if there are several joint tenants, a heriot will not be due until the death of the longest liver of them, as however many persons there are, they all make but one tenant to the lord.<sup>2</sup> Though a corporation is immortal and cannot die, yet it is said that by special custom a heriot may be due on the death or avoidance of its head.<sup>3</sup>

Mr. Watkins, who heartily hated the whole subject of his book, thus lays down the law on another point:—<sup>4</sup> “If the lands escheat or in any other way return to the lord, it seems agreed that heriot service shall be absolutely extinct; *and by the bye, it would be odd enough to think that it should not, for how shall the services continue longer than the tenancy for which they were to be rendered?*” A conclusion which appears to us to be a perfectly safe one.

In some manors a heriot is due not only on the death of the tenant, but also on the alienation of the lands, or on alienation only.<sup>5</sup>

But perhaps the crowning inconvenience of heriots is, that they are not only due from tenants who die within the manor, but they are due wherever the tenant may die, and the best

<sup>1</sup> *Waxy*, another well-known race-horse, was seized as a heriot, and more recently *Nonsense* from the stud of the Earl of Egremont, and we have heard of some other members of the Jockey Club who are liable to a similar danger when they least expect it.

<sup>2</sup> Bro. Harriot, 4.; 2 Watk. Cop. [148.]

<sup>3</sup> See Fitz. Harriott, 7. On the death of the Provost of Worcester a heriot is said to be due to the president and scholars of St. Mary Magdalen College, Oxford, for a copyhold estate held of that society at Whitfield, in the manor of Sydenham in Northamptonshire, and from the society of Magdalen to that of Merton in Oxford, on the same occasion. Fish. Cop. 81., n.

<sup>4</sup> 2 Watk. [160.]

<sup>5</sup> Kitch., 265.; 1 Scriv. Cop. 444.

beast or chattel which he then possesses is forfeited.<sup>1</sup> This rule frequently operates by surprise. A man may be tenant of a manor, and may be in this character the owner of a small copyhold tenement of which he almost forgets the existence. He may settle elsewhere, and become possessed of a most valuable beast or chattel, which may thus be snatched from him to the serious loss of his family. This was very near happening in the case of the Pigot diamond which we have already alluded to.<sup>2</sup> The poor pawnbroker little thought of his liability as owner of a small piece of land in Cumberland when he became possessed for a temporary purpose of this immense treasure. And thus of a sudden a man may lose his best picture or his most valuable horse.

We think we have now said enough to show how inconsistent the heriot is with the feelings and temper of the age, and how hardly it may operate upon the tenant. Let us briefly show that its payment is frequently evaded, and is thus of little certain or regular value to the lord; and here we will quote again from the 3d Real Property Report. "When the tenant dies," say the Real Property Commissioners, "his best beast, or best chattel, is to be seized by the lord, the lord being entitled to enter the house or land, and appropriate to himself the object of his choice. In this case the benefit conferred by the right is not nearly equivalent to the prejudice done to those against whom it is exercised. It leads not only to ill-will and strife between neighbours, but to constant fraud and evasion. To defeat the claim of the lord, the legal estate is placed in the name of a person whose residence will prevent the lord from exercising his right. When a yeoman is supposed to be *in extremis*, his family sell his cattle at a sacrifice, or *drive them out of the manor*.<sup>3</sup> The steward, on the other hand, makes irregular entries on the roll, and procures irregular presentments by the homage of heriots being

<sup>1</sup> Kitch., 264, 265.; Bendl., 18.; 2 Nels. Abr., 931.; 1 Scriv. Cop. 462.

<sup>2</sup> See *antè*, p. 269.

<sup>3</sup> This last expedient would not avail; see *antè*, p. 271. It should be observed that by stat. 13 Eliz. c. 5. s. 2., every conveyance of goods and chattels made with the intent to defraud others of their heriots shall be deemed to be utterly void. But the disposition has been to construe this statute strictly. See Creswell & Coke's Case; 2 Leon. 5.; S. C. Dyer, 351 b.

due on the death of the tenants, and of payments being executed or compromised with a view to make evidence to extend the lord's claim on some future occasion."<sup>1</sup>

Mr. Stewart, in his *Suggestions on Law Reform*<sup>2</sup>, writes to the same effect :

"This is an incident which is often extremely vexatious and troublesome to the tenant, but by no means adequately remunerative to the lord. The payment is constantly evaded. It should be the best beast or the best chattel of which the tenant dies possessed ; but he is aware of this circumstance, and by one contrivance or other he manages to hand over on his death a very sorry beast, or a very indifferent chattel. The feelings and temper of the times are against the payment, and the tenant thus justifies himself in baulking the lord of his legal rights. On this point I will venture to appeal to the experience of nine lords out of ten whether the right to heriots is not often more trouble than profit, and whether in fact they now receive any thing like their fair claim."

We have here, then, a branch of the law which satisfies nobody, and leads to constant fraud and evasion. How, then, can heriots be got rid of? This is the only remaining question.

The Real Property Commissioners gave it as their opinion that they should be abolished upon a pecuniary commutation. "We propose," say they, "that the claim to the heriot in specie shall be commuted into a right to a sum of money for which the lord shall be allowed to distrain on the tenement, or to maintain an action against the person succeeding to the tenancy ; even if a sum so low as five pounds were paid for each heriot, not only would the tenant be greatly relieved, but the change would probably be found for the advantage of the lord, as he would not then scruple to enforce his right, and no attempt would be made to evade it."

This plan did not, however, obtain much favour ; and although a Bill was brought in to carry it into effect, it was not proceeded with. The fixing one uniform value for heriots, without looking to the particular circumstances of the case, appears to be obviously erroneous. Besides, what is wished by the tenant is an entire discharge of his lands from this burden.

<sup>1</sup> 3 R. P. Rep., p. 19.

<sup>2</sup> p. 70.

Some progress has already been made in the enfranchisement from heriots under the Copyhold Act 4 & 5 Vict. c. 35., which embraces that, together with other manorial incidents, and we propose now to state, from the best sources of information which we can obtain, what has been done in this matter. In the "Terms for Enfranchisements" issued by the Copyhold Commissioners, they suggest the following as a basis for any enfranchisement from heriots. "Two heriots and a half on the average of the three last heriots." This, we dare say, would in many cases meet the justice of the case, and has, we see, been acted on in some instances; but we conceive it would be more easy to fix some round sum, on which, being paid, an entire discharge might be made. This should not fall on all the tenants alike. It will be found necessary to divide them into classes, according to their circumstances, and the probabilities of obtaining a beast or a chattel of greater or smaller value. But we apprehend that two, or at most three classes, for this purpose will be found sufficient.

Looking, then, at the Reports of the Commissioners which are before us, in which the terms which have already been arranged are stated, we find the following sums have been given.

In the manor of Broxham, Kent, an enfranchisement has been effected by paying the value of  $2\frac{1}{2}$  heriots at 10*l.* 10*s.*, each heriot to principal tenants, and 5*l.* to smaller tenants.<sup>1</sup> In the manor of Condovery, the value of  $2\frac{1}{2}$  heriots at 10*l.* each.<sup>2</sup> In the manor of Croydon, in a piece of land subject to five heriots, the Archbishop of Canterbury has taken 20*l.* for the first heriot, and the four remaining heriots at 10*l.*;<sup>3</sup> and in another enfranchisement in the same manor, his Grace has taken 12*l.* In the manor of Lambeth he has taken 20*l.* for one heriot.<sup>4</sup> In the manor of Condovery, in Shropshire, the lord has taken  $2\frac{1}{2}$  heriots at 10*l.* each. In many other cases the value of the heriots has been mixed up with the price given for the enfranchisement. We are inclined, however, to think, that if a lord can obtain from his better class of tenants 20*l.*, and from his inferior tenants 10*l.*, as a total price for an

<sup>1</sup> Third Rep. (1844.)

<sup>2</sup> Ib. Fourth Rep. (1845.)

<sup>3</sup> Ibid.

<sup>4</sup> Third Rep., (1844.)

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|     |                                  |                                                    |                                            |                                                                                           | 15                                                                                                                             | 16                |
|-----|----------------------------------|----------------------------------------------------|--------------------------------------------|-------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|-------------------|
|     |                                  |                                                    |                                            |                                                                                           | Number of Years, or<br>Period for which<br>Payment of Money<br>to be postponed.<br>Installments to be<br>paid half-yearly, &c. | Other<br>Matters. |
| 1   | 2                                | 3                                                  | 4                                          | 5                                                                                         |                                                                                                                                |                   |
| No. | Names<br>of<br>Tenants.          | Residence.                                         | Description.                               | Description.                                                                              |                                                                                                                                |                   |
| 1   | R. B.                            | Westerham,<br>Kent                                 | Vicar of<br>Westerham                      | Acroft called<br>Lan. in the<br>Lan. in the<br>and Midge                                  |                                                                                                                                |                   |
| 2   | R. D.                            | Brasted,<br>Kent                                   | Carpenter                                  | A tenement<br>four Elms<br>Blake's                                                        |                                                                                                                                |                   |
| 3   | E. A. D.                         | Moorecock's<br>Farm, Brasted,<br>Kent              | Widow                                      | A tenement<br>called Mo<br>James Dou                                                      |                                                                                                                                |                   |
| 4   | Sir John G.                      | Stanwell Park,<br>Staines,<br>Middlesex            | Baronet                                    | A messuage<br>Jane Ord's<br>Bearshaw<br>Newbernes<br>croft                                |                                                                                                                                |                   |
| 5   | A. F. G.                         | Dairy Farm,<br>Westerham,<br>Kent                  | Widow                                      | Land called<br>otherwise<br>formerly Georg<br>John Holtr<br>husband Wa                    |                                                                                                                                |                   |
| 6   | T. H.                            | At present<br>quartered at<br>Leith in<br>Scotland | Lieutenant-<br>colonel, Royal<br>Artillery | One acre lying<br>lands called<br>towards the<br>formerly L.<br>Miss Jane P<br>wards Theo |                                                                                                                                |                   |
| 7   | C. L. and<br>Martha his<br>wife. | Cowfold, near<br>Horsham,<br>Sussex                | -                                          | Lands, part<br>and Deers<br>Cackett's,<br>Ward's                                          | the next act<br>or event on<br>which a heriot<br>shall be pay-<br>ble.                                                         |                   |
| 8   | R. M. and<br>Mary his wife.      | Hever, Kent                                        | Farmer                                     | Land, former<br>and after<br>Larking's,<br>Four Elms                                      |                                                                                                                                |                   |
| 9   | H. S.                            | Chidding-<br>stone, Kent                           | Esquire                                    | Lands called<br>otherwise<br>merly Soph                                                   |                                                                                                                                |                   |

WE whose hands and seals are hereu  
do order the several sums above specified to  
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as costs shall be paid to G. L. A. and V  
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ment from heriots, these are sums which the  
**MA** not refuse to take, or the tenant refuse to pay.

some particular manors, as those near London,

**PROPORTION** many wealthy persons reside, we are satisfied that the  
 pursuant to an Act collecting heriots is not worth more than this to the  
 of Rights in respec in many country manors unconnected with towns  
 Lands, and for to amend and ex not worth so much, and here a smaller sum may very  
 Lands subject to be taken.

sum is once agreed upon, the expense attending the  
 isement is inconsiderable. If six tenants join, a

*Discription* e may be employed<sup>1</sup> which is exempted from stamp  
 and is the only instrument which is necessary to com-  
 he transaction. In a recent case, we are informed, the

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 expense to each tenant did not exceed 2*l*.; and although,  
 os, this was completed under somewhat favourable cir-  
 ances, yet we are assured there is nothing in the nature

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 e transaction to render it costly. We think it may be

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 to conclude this notice by a form of schedule which  
 adopted in a recent enfranchisement from heriots and  
 rents, to which we are desirous of giving all possible  
 dlicity.<sup>3</sup>

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 Whether the time has not now arrived when some compul-  
 y provision with respect to enfranchisement from heriots  
 ight not be safely and properly introduced, we shall not now  
 quire, but defer this point to a future time, when we pro-  
 ose entering upon the general question.

<sup>1</sup> 4 & 5 Vict. c. 35. s. 56.; & 7 Vict. c. 27. s. 9.

<sup>2</sup> 4 & 5 Vict. c. 35. s. 93.

<sup>3</sup> See the Table facing this page.

ART. III. — LORD ELDON AS A LAW REFORMER.<sup>1</sup>

1. *Reports of Cases in the Court of Common Pleas from 1799 to 1801.* By J. BOSANQUET, Esq. and CHRISTOPHER PULLER, Esq. 2d vol. fol. 1802.
2. *Reports of Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Eldon.* By FRANCIS VESEY, jun., Esq. 13 vols. 8vo. from 1802 to 1819.
3. *Reports of Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Eldon.* By FRANCIS VESEY and JOHN BEAMES, Esqrs. 3 vols. 8vo. from 1812 to 1815.
4. *Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Eldon.* By GEO. COOPER, Esq. 1 vol. 8vo. 1815.
5. *Reports of Cases in Bankruptcy decided by Lord Chancellor Eldon from 1801 to 1816.* By GEO. ROSE, Esq. 2 vols. 8vo. 1813. 1816.
6. *Reports of Cases in the House of Lords.* By P. DOW, Esq. 6 vols. 8vo. 1813 to 1818.
7. *Reports of Cases argued and determined in the High Court of Chancery.* By J. H. MERIVALE. 3 vols. 8vo. from 1815 to 1817.
8. *Reports of Cases argued and determined in the High Court of Chancery in the time of Lord Chancellor Eldon.* By C. T. SWANSTON, Esq. 3 vols. 8vo. from 1818 to 1819.
9. *Reports of Cases in Bankruptcy from 1816 to 1820.* By J. W. BUCK, Esq. 1 vol. 8vo.
10. *Reports of Cases in the House of Lords.* By RICH. BLIGH, Esq. 3 vols. 8vo. from 1819 to 1821.
11. *Reports of Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Eldon.* By EDW. JACOB and JOHN WALKER, Esq. 2 vols. 8vo. from 1819 to 1821.

<sup>1</sup> The views of the writer of this article, it will be seen, are widely different from our own, as already shown in this work. We are desirous, however, of shedding all possible light on the character and labours of a man who not only held the great seal, but who practically governed this country for nearly a quarter of a century, and to whose eminent character and labours as a lawyer we are anxious to bear witness. The only excuse which can be made for Lord Eldon's conduct, as to the reform of the law, is here given, viz. that it is not the duty of the Lord Chancellor to attend to it. But if this be a good reason, how greatly is the argument of our first article helped as to the necessity of appointing a minister of justice! — ED.

12. *Reports of Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Eldon.* By EDW. JACOB, Esq. 1 vol. 8vo. from 1821 to 1822.
13. *Reports of Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Eldon.* By G. TURNER and J. RUSSELL, Esqrs. 1 vol. 8vo. from 1822 to 1824.
14. *Reports of Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Eldon.* By JAMES RUSSELL, Esq. 3 vols. 8vo. 1826 and 1827.
15. *New Reports of Cases in the House of Lords.* By RICHARD BLIGH, Esq. 1 vol. 8vo. 1827.
16. *Cases in Bankruptcy.* By T. C. GLYN and R. S. JAMESON, Esqrs. 2 vols. 8vo. from 1824 to 1827.

SUCH is the long list of Lord Eldon's reported judgments, to be read, marked, learned, and inwardly digested by the laborious student, before he can form any adequate conception of his merits as a judge. After making the necessary deductions for the labours of the Master of the Rolls, whose judgments are reported with his,—after rendering due honour to the zeal and industry which sat at the foot of this Gamaliel, and would not “that a leaf of his should fade,” enough is left to excite our wonder at his indefatigable and unrivalled industry. Nearly fifty closely printed octavo volumes, which, if all his judgments and decrees had been preserved, would be doubled in number; and every individual case so well sifted, every decree so well weighed, that it may serve as a valuable precedent! What other judge has left such a monument to his memory! Lord Mansfield sat for thirty-two years, and his reported judgments fill seven or eight volumes. Lord Hardwicke held the Great Seal twenty years, and his judicial labours are comprised in six volumes. If we look to quality instead of quantity, there is the same disparity. The late Sir William David Evans gave two quarto volumes to his *View of the Decisions of Lord Mansfield in civil causes*. The age of quartos is past, and we hope it may never return. But, as it is impossible to put an *Iliad* into a nut-shell, so that it may be read, we must content ourselves at present in viewing one of the phases of Lord Eldon's judicial character.

Was that eminent judge a reformer or amender of the law

of England? This is the head and front of his offending. One of his opponents, in a work the elegance of whose quotations, and the solemnity and earnestness of its tone, have blinded the world to a singular waywardness in seeing every thing with the wrong side outwards, and to reasoning from imperfect deduction, observes, "There is no other person known to the constitution but the Lord Chancellor upon whom the material amendment of the law practically devolves. Lord Eldon came into power at a conjuncture when the decided change which was taking place in the texture of society, wealth, commerce, and population of the country, indicated that a greater change in our law and legal institutions would soon become desirable, than had taken place at any antecedent period of our history. Had he prompted, promoted, or superintended this great work, the length of his reign and extent of his influence would have enabled him to bring it almost, or altogether, to its completion, and thus to have left a monument to his memory which it falls to the lot of few individuals to have the power of erecting. Unfortunately for the country and his own reputation, he has followed a totally opposite course. With all the knowledge, industry, and sagacity which Lord Eldon possesses, he is even now grievously hindering the improvement of the law as a science, and has done an injury to it as a profession, which is almost irreparable."<sup>1</sup>

Lord Eldon might have answered, "*Non hæc in fœdera veni.* None of my predecessors have considered the general supervision and amendment of the law as their province, and the great increase of wealth and population in the country, which have trebled or quadrupled the ordinary duties of my office, have left me no time or leisure to devote to the subject." But, without attempting here to prove by an induction of instances that this defence is good, let us examine how far Lord Eldon's ideas of amending the law have been followed in modern times.

At his first taking his seat in the Court of Chancery, Lord Eldon expressed "his strong indignation at the frauds committed under cover of the bankrupt law. The abuse of the bankrupt law is a disgrace to the country; and it would be

<sup>1</sup> Miller on the Present State of the Civil Law of England, pp. 524. 527.

better at once to repeal all the statutes, than to suffer them to be applied to such purposes. There is no mercy to the estate: commissions are considered as matter of traffic,—as stock in trade. The court is accessary to as great a nuisance as any known in the land, and known to pass under the forms of its law.<sup>1</sup>”

These observations naturally lead to the consequence, that standing commissioners were appointed by stat. 1 & 2 Will. 4. c. 56. and stat. 5 & 6 Vict. c. 122.

Lord Eldon more than once declared, that there was no rule with respect to illusory appointments, which did not leave mankind in a state of ignorance and uncertainty how they are to act<sup>2</sup>; and that the law upon that subject was in such a state of confusion, both from dicta and decisions, that, if he had to advise, he could not say how such a power could be safely exercised.<sup>3</sup>

After such a declaration from such a lawyer as Lord Eldon, it was impossible that the law should stand; and by stat. 1 Will. 4. c. 46. s. 1. it was declared, that no appointment should be set aside in equity on the ground of its being illusory.

The effect of the decisions upon trustees to preserve contingent remainders joining or not joining in a settlement or sale was, that their discretion could never be safely exercised. “That,” said Lord Eldon, “amounts to this, that the Lord Chancellor and the Master of the Rolls are the trustees of all the estates in the kingdom.”<sup>4</sup> Such a *reductio ad absurdum* could not be resisted; and by stat. 3 & 4 Will. 4. c. 74. s. 36. courts of equity are prohibited from controlling the consent of a protector of a settlement, or treating it as a breach of trust. Considering how seldom trustees are found willing to act for themselves, and how frequently and unnecessarily they call for the assistance and sanction of courts of equity, it may deserve consideration whether their appointment should be left in private hands. It has been proposed to place all charities in official hands, and the principal objection to extending

<sup>1</sup> Regulations in Bankruptcy, 6 Ves. 1.

<sup>2</sup> Bax v. Whitbread, 16 Ves. 21.

<sup>3</sup> Butcher v. Butcher, 1 Ves. & B. 96.

<sup>4</sup> Moody v. Walters, 16 Ves. 310.

the powers of the commissioners to all trusts would be, the difficulty of drawing the line as to adequate magnitude and difficulty.

Lord Eldon's statement of the anomaly, that powers which an insolvent might execute for his benefit would vest in his assignees, but similar powers in a bankrupt would not pass to them<sup>1</sup>, led immediately to an enactment (stat. 3 Geo. 4. c. 31. s. 3., 6 Geo. 4. c. 16. s. 77.), that all such powers may be executed by the assignees for the benefit of the creditors.

His inflexible adherence to principle, in refusing to apply funds of a charity according to circumstances, as long as the main object of the founder is attainable, as the funds of a grammar school to instruction in writing, arithmetic, and the learned languages<sup>2</sup>, though censured by Coleridge in his *Table Talk*, has been confirmed by stat. 3 & 4 Vict. c. 77., enlarging the powers of Courts of Equity in this respect, but only when the revenues of the charitable fund are insufficient to effect the main object.

For other instances in which Lord Eldon recommended amendment of the law by the Legislature, see *Dare v. Tucker*, 6 Ves. 460.; *Ridgeway v. Darwin*, 8 Ves. 67., a suggestion adopted in stat. 1 & 2 Geo. 4. c. 114.; *Ex parte Dikes*, 8 Ves. 80., carried into effect by stat. 43 Geo. 3. c. 75.; *Eagleton v. Kingston*, 8 Ves. 470., see stat. 1 Vict. c. 26.; *Newman v. Hodgson*, 7 Ves. 409.; *Auriol v. Smith*, 18 Ves. 203., see stat. 7 & 8 Geo. 4. c. 29. s. 49.; *Walker v. Wingfield*, 18 Ves. 443., stat. 52 Geo. 3. c. 146.; *Ex parte Wheeler*, 3 Ves. & B. 22., stat. 7 & 8 Geo. 4. c. 64.; *Bromley v. Holland*, Coop. 20., stat. 53 Geo. 3. c. 141. s. 6.; *Ex parte Whitehead*, 1 Mer. 127.; 19 Ves. 557., stat. 6 Geo. 4. c. 16. s. 54.; *Ex parte Roscoe*, 1 Mer. 191., stat. 3 Geo. 4. c. 81. s. 2.; *E. Belfast v. Chichester*, 2 Jac. & W. 439., stat. 5 & 6 Vict. c. 69.

The Act establishing a jury in civil cases, stat. 55 Geo. 3. c. 42., is understood to have originated from Lord Eldon (see *Smith v. Macneill*, 2 Dow. 544.), and the Act upon which the law of bankruptcy stands at present (stat. 6 Geo. 4. c. 16.) was undoubtedly revised by him; and he introduced a bill in June 24. 1830, to settle the law on the subject of divorces

<sup>1</sup> *Thorpe v. Goodall*, 17 Ves. 393.

<sup>2</sup> *Attorney-General v. Whiteley*, 11 Ves. 251.; *Bedford Charity*, 2 Swan, 528.; *Attorney-General v. Mansfield*, 2 Russ. 501.

granted in Scotland for dissolution of marriages celebrated in England.<sup>1</sup> This would probably have put an end to the anomalies caused by Lolly's case<sup>2</sup>, and ably exposed by Lord Brougham in *Doe d. Birtwhistle v. Vardill*.<sup>3</sup>

Enough has been said to show that Lord Eldon had no bigoted horror of legislative amendment; let us see the limits he proposed to legal reform. "My opinion has long been, that what should be attempted should not go further than rendering more simple and less expensive the forms under which the present system of real property is carried on, by legislative provisions introduced into Parliament from time to time. The system itself should not be changed, or at least should be touched with a very delicate hand<sup>4</sup>;" and this is in general the nature of the legal reforms which have been introduced really deserving the name. Neither Lord Eldon, nor any of his contemporaries, ever entertained the idea of throwing the whole body of law into the crucible. "He must be a bold man who undertakes, on any abstract ideas, to new-model the constitution of a country."<sup>5</sup> JOHNSON — "Lord Bute, Sir, took down too fast, without building up something new." BOSWELL — "Because, Sir, he found a rotten building. The political coach was drawn by a set of bad horses; it was necessary to change them." JOHNSON — "But he should have changed them one by one."<sup>6</sup> Even at the present day, a bit-by-bit reform is all that is attempted, and to the disgrace, it is said, of the nineteenth century, England has not yet found her Tribonian.<sup>7</sup>

Let us pass now to a different subject, — the new or improved principles and practice introduced into the Court of Chancery while Lord Eldon presided there. The reference of title to the master when nothing but title is in dispute, is an invention of Lord Eldon's<sup>8</sup>, by which an infinite number of suits have been stopped *in limine*. Prevention

<sup>1</sup> Twiss's Life, iii. 128.

<sup>2</sup> Russ. & Ry. 237.

<sup>3</sup> 9 Bligh New, 71.; Moylan's Antenatus, p. 30.

<sup>4</sup> Letter to Sir Edward Sugden, Twiss's Life, iii. 437.

<sup>5</sup> Lord Thurlow in *Forbes v. Macpherson*, Bligh, 135.

<sup>6</sup> Boswell's Johnson, a. 1775.

<sup>7</sup> Hallam's Middle Ages, ii. 471.

<sup>8</sup> Fullagar v. Clarke, 18 Ves. 482.; Brooke v. Clarke, 1 Sw. 551.

of mischief by injunction is a head of equity upon which instances few and far between are to be found before his time. Lord Thurlow would hardly grant an injunction where the parties had a remedy at law. Before his time, there are not more than half a dozen instances of each species of injunction, and in these relief was as often denied as granted. Now injunction is, it is well known, the right arm of the Court, pervading the workshop of the artizan, the studio of the artist, — entering alike the miner's shaft, and the merchant's counting-house. Almost all the principles upon which this relief is granted or refused, the terms and conditions upon which it is dissolved, revived, continued, extended, or made perpetual, are to be found in Lord Eldon's judgments alone.

The rules of ordering money into Court, and appointing receivers on behalf of all parties, are powerful instruments of justice, of which Lord Eldon showed first the perfect use.

The inspection of the subject-matter in dispute pending litigation is another of the powers to which Courts of Equity have become entitled through his means.<sup>1</sup>

These and many other topics will show, that the Court of Chancery under Lord Eldon's superintendence was not a clog and a burden upon the rank, wealth, and industry of the country, but that, in the progress of society, new safeguards and protections were from time to time introduced. Whether they should be introduced by the Legislature, or the judges, is a question of infinite compass, which it is not intended here to discuss.

Before we close the character of Lord Eldon as a law reformer, let us consider a little the charge against him of "ridiculing and resisting every attempt which is made for its improvement."<sup>2</sup> Coleridge gave Windham public thanks for having stopped a great number of Acts<sup>3</sup>; and, with due respect to the Legislature, every volume of the statutes contains many which ought never to have seen the light. It would be invidious to particularise in a general statement of which every practiser has seen and felt the truth; it will be better to examine into the cause of Lord Eldon's objections.

<sup>1</sup> See *Kynaston v. East India Company*, 3 Swan, 248.; 3 Bligh, 153.

<sup>2</sup> *Miller's Civil Law*, p. 527.

<sup>3</sup> *Friend*, vol. i. 158.



The bent of his mind was essentially practical; all his decrees, orders, and rules may be well worked out and carried into effect, and his first question on any proposed measure was, How will it work? Tried by this test, many a plausible scheme shrinks to nothing. Sir Samuel Romilly's Act for giving a summary remedy in cases of charity, stat. 52 Geo. 3. c. 101., was declared by him to have done more harm than good<sup>1</sup>, to have been drawn in haste<sup>2</sup>, and all the proceedings under it for a number of years in the cause then before him to be money thrown away.<sup>3</sup> This he might say more fairly, as both then and on other occasions<sup>4</sup> he acknowledged that he had a hand in it. What can be more equitable than to give a speedy relief to the poor on the representation of the officers of the Crown? But if purchasers, tenants, holders of the legal estate, litigating trustees, and contending parishioners can be included in such relief, it would be a curse, and not a benefit. The Act has not drawn the line, but left it to judicial decision to do so. It would be well, therefore, if it had never passed.

Now if this is the case, when the object of the Act is unquestionably praiseworthy, how much more when the policy is questionable, when the hardship is admitted, when wrong must be done to some parties by any alteration of the law of the land? As an opposer of new statutes, as a bar to judicial innovation, as a resister of every alteration of which the consequences were not well foreseen, we have reason to consider Lord Eldon an improver of the law.

*Tu maximus ille es*

*Unus qui nobis cunctando restituis rem.*

It may be said, there is nothing of vigour or decision in Lord Eldon's reforms; his suggestions "just hint a fault, and hesitate dislike;" he rather taught others to amend the law, than performed it himself. True. It is seldom we find in the same mind the courage of the soldier, and the caution of the sentinel. To one is given the sagacious head to fit the feather end of the wedge into the exact fissure, to another the

<sup>1</sup> *Ludlow v. Greenhouse*, 1 Bligh, New, 44.

<sup>2</sup> *Ibid*, 82.

<sup>3</sup> *Ib.* 80.

<sup>4</sup> *Attorney-General v. Green*, 1 Jac. & W. 307.

vigorous and determined arm to drive it home and displace the stone. The planner and the perpetrator share the crime, — the inventor and introducer partake in the patent.

This is, as we have before observed, only one of the phases of Lord Eldon's judicial character; a contemplation of the whole of them only can give a proper estimate of its magnitude. Such are, "Lord Eldon's general knowledge," an amusing subject; "the practical nature of his decrees," an instructive one; "his strong points," a fruitful topic; "his crotchets," a difficult one; "Lord Eldon compared with the judges of his time," "his judicial patronage," both invidious topics, which, nevertheless, ought to be thoroughly discussed in a sketch of his judicial character.

To conclude, as we begun, with the *labor improbus* bestowed on his judgments, neither rank, power, nor opulence was its object or reward. All the wealth he possessed, all the titles he obtained and the alliances he formed, all the power and influence he undoubtedly held, would have been his, had he given his judgments as shortly, or, generally speaking, it must be said as unsatisfactorily, as Lord Thurlow. A sense of duty alone incited him to and supported him in the continued toil of a quarter of a century, in erecting and forming a structure which it is the labour of a life to gain an adequate comprehension of.

Εν ΜΑΚΑΡΕΞΞΙ πορυν αραξιος ειη αμοιβη.

#### ART. IV.—ON THE PROOF OF HANDWRITING.

FEW rules in the law of evidence are more interesting in theory or more useful in practice, than those which relate to the proof of handwriting; yet it is an undoubted fact, that on no subject are the opinions expressed even by sound lawyers less satisfactory or consistent. It will be our endeavour, therefore, in the present Article, to discuss this branch of the law, in the hope that our observations may prove of some service to those who are actively engaged in the conduct of causes at Nisi Prius.

When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the writer himself, if he be a competent witness, or some person who actually saw the paper or signature written. When such evidence cannot be procured, as must often be the case, recourse may be had to the testimony of witnesses who are acquainted with the handwriting. Such evidence, indeed, may in all cases be given in the first instance, as the law recognises no distinction between these several modes of proof; but, as it is clearly less satisfactory than direct testimony, any unnecessary reliance on it will raise a suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

The knowledge of a person's handwriting may have been acquired in both or either of two ways.<sup>1</sup> The first is, from having seen him write; and though the weight of the evidence which depends upon knowledge so obtained, must, of course, vary in degree, according to the number of times that the party has been seen to write, the circumstances, whether of hurry or deliberation, under which he wrote, the interval that has elapsed since the last time, and the opportunities and motives which the witness had for observing the handwriting

<sup>1</sup> See 3 Benth. Jud. Ev. 598, 599.

with attention<sup>1</sup>; yet the evidence will be admissible, though the witness has not seen the party write for twenty years<sup>2</sup>, or has seen him write but once, and then only his surname.<sup>3</sup>

Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents.<sup>4</sup> The proof, in such cases, may be very slight, but the jury will be allowed to weigh it. The witness need not state, in the first instance, how he knows the handwriting, since it is the duty of the opposite party to explore, on cross-examination, the sources of his knowledge, if he is dissatisfied with the testimony as it stands.<sup>5</sup> Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded; though, if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be rejected.<sup>6</sup> Where a witness, called to establish a forgery, had become acquainted with the signature of the party from having seen him sign his name, after the commencement of the suit, for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon justly observing that the party might, through design, have written differently from his common mode of signature.<sup>7</sup>

The second way in which the knowledge of a person's handwriting may be acquired, is by the witness having seen, in the

<sup>1</sup> *Doe v. Suckermore*, 5 A. & E. 730., per Patteson J.

<sup>2</sup> *R. v. Horne Tooke*, 25 How. St. Tr. 71, 72.; *Eagleton v. Kingston*, 8 Ves. 473, 474., per Lord Eldon.

<sup>3</sup> 5 A. & E. 730., per Patteson J.; *Garrells v. Alexander*, 4 Esp. 37., per Lord Kenyon; *Willman v. Worrall*, 8 C. & P. 380.; *Burr v. Harper*, Holt's N. P. R. 420.; *Lewis v. Sapio*, M. & M. 39., per Lord Tenterden, who refused to recognise the authority of *Powell v. Ford*, 2 Stark. R. 164., where Lord Ellenborough rejected the testimony of a witness, who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See also *Warren v. Anderson*, 8 Scott, 384.

<sup>4</sup> *George v. Surrey*, M. & M. 519., per Tindal C. J., after some hesitation.

<sup>5</sup> *Moody v. Rowell*, 17 Pick. 419., overruling *Slaymaker v. Wilson*, 1 Pennsylv. R. 216.

<sup>6</sup> *R. v. Murphy*, 8 C. & P. 306, 307., per Coleridge J.; *Da Costa v. Pym*, Pea. Add. R. 144., per Lord Kenyon.

<sup>7</sup> *Stanger v. Searle*, 1 Esp. 15. See *Page v. Homans*, 2 Sheph. 478.

ordinary course of business, documents, which by some evidence, direct or circumstantial, are proved to have been written by such person. Thus, if the witness has received letters purporting to be in the handwriting of the party, and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the party as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible.<sup>1</sup> So, if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is, that the answer was written by the person addressed in the letter; and consequently, the witness who received such answer, may be examined as to the genuineness of any other paper, which it is necessary to show was or was not written by the same person.<sup>2</sup> Again, the clerk who constantly read the letters, or the broker who was consulted upon them, is as competent as the merchant to whom they were addressed to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him.<sup>3</sup> In one case, an attorney was permitted to speak to the signature of an attesting witness, though his knowledge of the handwriting was solely derived from having seen the same signature attached to an affidavit, which had been filed by the opposite party in a previous stage of the cause.<sup>4</sup> Here the opposite party, having used the affidavit as a genuine document, was in a

<sup>1</sup> *Doe v. Suckermore*, 5 A. & E. 731., per Patteson J.; 2 Nev. & P. 46., S. C.; *Lord Ferrers v. Shirley*, Fitz. 195., B. N. P. 236.; *Carey v. Pitt*, Pea. Add. R. 130.; *Tharpe v. Gisburne*, 2 C. & P. 21.; *Harrington v. Fry*, Ry. & M. 90.; *Burr v. Harper*, Holt's N. P. R. 420.; *Comm<sup>th</sup>. v. Carey*, 2 Pick. 47.; *Johnson v. Daverne*, 19 Johns. 134.; *Pope v. Askew*, 1 Tredell, R. 16.

<sup>2</sup> *Carey v. Pitt*, Pea. Add. R. 130., per Lord Kenyon.

<sup>3</sup> *Doe v. Suckermore*, 5 A. & E. 740., per Lord Denman.

<sup>4</sup> *Smith v. Sainsbury*, 5 C. & P. 196., per Park J., cited by Lord Denman in *Doe v. Suckermore*, 5 A. & E. 740.

manner estopped from disputing the fact that it was signed by the person whose signature it bore. But perhaps, after all, some doubt may be entertained respecting the correctness of this decision; since, in another case, the plaintiff's attorney was not allowed to prove the defendant's handwriting, though he had frequently seen and acted upon other papers in the master's office, which the opposite attorney admitted had been written by the defendant. Where, in an action on a joint and several promissory note against three persons, the signature of one of them was attempted to be proved by calling the attorney for the defendants, whose knowledge of his handwriting was founded on the circumstance, that he had required a retainer signed by his three clients, and had in fact received one purporting to be so signed, and had acted upon it in defending the action, the Court of Common Pleas held that his testimony was inadmissible, inasmuch as there was no proof that the party had ever acknowledged the signature to the attorney, and either of the other two defendants might have signed the retainer for him with his assent.<sup>2</sup> So the testimony of an inspector of franks, called to prove the handwriting of a member of parliament, has more than once been rejected, where the knowledge of the witness has been simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he has never communicated with the member on the subject of the franks; for, in this case, there is no evidence to prove that the superscriptions of the letters he had seen were not forgeries.<sup>3</sup> These last decisions certainly carry the law to the verge of impropriety, since they are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sensible rule, that a crime is not to be presumed, or so much as suspected, without special ground, in any single instance; much less in a number of unconnected instances.<sup>4</sup>

<sup>1</sup> Greaves v. Hunter, 2 C. & P. 477., per Abbott C. J.

<sup>2</sup> Drew v. Prior, 5 M. & Gr. 264.

<sup>3</sup> Carey v. Pitt, Pea. Add. R. 130., per Lord Kenyon; Batchelor v. Honeywood, 2 Esp. 714., per id.

<sup>4</sup> 3 Benth. Jud. Ev. 604.

In whichever of these two ways the witness has acquired his knowledge of handwriting, it is obvious that evidence, identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either *aliunde*, or by the testimony of the witness himself, if he is personally acquainted with the writer.<sup>1</sup> If this were not so, the witness might be proving the handwriting of one man, while the party calling him might be seeking to establish the signature of another.

When witnesses are called to speak to handwriting, they should declare their *belief* on the subject, though, in one case, it has been held by Lord Kenyon, that the evidence of a witness who admitted his inability to form a belief, but who stated that the paper produced was *like* the handwriting of the individual by whom it purported to have been written, was admissible.<sup>2</sup> This case, though recognised by Lord Wynford<sup>3</sup>, has been questioned by Lord Eldon<sup>4</sup>, and apparently with reason. It may be very true, as Lord Eldon admits, that witnesses are occasionally pressed too much to form a belief<sup>5</sup>; and some allowance should certainly be made for the over caution of a scrupulous witness; but though it may be very proper to admit the testimony of a person, who, declining to express a decided belief, will yet declare that he is of *opinion* or that he *thinks* the paper is genuine, yet it is going a step further when the witness will only state that the handwriting is like; — a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison, — it being the belief which a witness entertains, when comparing the writing in question with an exemplar in his mind, derived from some previous knowledge<sup>6</sup>, — yet the law will not allow the witness, or even

<sup>1</sup> See *Doe v. Suckermore*, 5 A. & E. 731., per Patteson J.

<sup>2</sup> *Garrells v. Alexander*, 4 Esp. 37.

<sup>3</sup> 2 Ph. Ev. 249. n. 2.

<sup>4</sup> *Eagleton v. Kingston*, 8 Ves. 476. See also *Cruise v. Claney*, 6 Ir. Eq. R.

552.

<sup>5</sup> *Eagleton v. Kingston*, 8 Ves. 476.

<sup>6</sup> *Doe v. Suckermore*, 5 A. & E. 730., per Patteson J.

the jury, except under circumstances that will be presently mentioned, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. Several reasons have been assigned for this rule. One is, that the jury may be too illiterate to form an opinion upon this sort of evidence. "Suppose," said Mr. Justice Yates, "some of the jury cannot read; how can they judge of the similitude?"<sup>1</sup> Surely this argument requires no answer at the present day, and never could have applied to the case of a witness being called upon to make the comparison; since a party would scarcely select for this duty a person, whose ignorance, instead of throwing light, would heap ridicule on his cause.<sup>2</sup> The second reason is, that specimens may be craftily selected, being such as are calculated rather to serve the purpose of the party using them, than to exhibit a fair example of the general character of the handwriting<sup>3</sup>; but to this it may be answered, first, that, if the specimens were authentic autographs, they would at least furnish *some*, though not the most satisfactory data, by which a comparison might be formed with the writing in dispute, since a certain similarity may be ever traced between the most dissimilar writings of the same person<sup>4</sup>; and secondly, that the unfairness of the selection would be open to inquiry, and if exposed, as it might easily be on cross-examination, would draw down on the party making the attempt the usual consequences of detected fraud.<sup>5</sup> If, indeed, the *genuineness* of the specimens be disputed, another and more serious objection to the mode of proof by comparison arises; for, in such an event, collateral issues might be raised upon every paper used as a standard; and it is further urged, that, as these papers might be also proved by mere comparison, the inquiry might lead to an endless series of issues, each more unsatisfactory than the

<sup>1</sup> Brookbard v. Woodley, Pea. R. 21. n. (a); Macferson v. Thoytes, id. 20. per Lord Kényon; Eagleton v. Kingston, 8 Ves. 475., per Lord Eldon; Burr v. Harper, Holt, N. P. R. 421., per Dallas J.; Doe v. Suckermore, 5 A. & E. 723., per Williams J., and 749., per Lord Denman.

<sup>2</sup> See per Lord Denman, in Doe v. Suckermore, 5 A. & E. 749.

<sup>3</sup> Burr v. Harper, Holt, N. P. R. 421., per Dallas J.

<sup>4</sup> See per Williams J., in Doe v. Suckermore, 5 A. & E. 726.

<sup>5</sup> See per Lord Denman, in Doe v. Suckermore, 5 A. & E. 751.



preceding.<sup>1</sup> The last branch of this argument is evidently founded on fallacy; since it is obvious that one specimen at least *must* be proved in some other way than by comparison; and such being the case, no man in his senses would run the risk of complicating, if not of defeating his proof, by tendering papers to be compared with this autograph, in order that such papers might in their turn form a standard, wherewith to compare the disputed document. Prudence, to say nothing of justice, would surely suggest the wisdom of producing the autograph alone. Indeed, the whole argument is much more specious than sound, as it would be never necessary, and seldom expedient, to prove more than one disputed specimen, and there could be no more danger or difficulty in allowing the judge to decide whether this proof had been satisfactorily established, than is now felt in those cases where the Court has to pronounce an opinion on the admissibility of confessions or dying declarations, or has to determine whether a deed has been duly executed or stamped, or whether sufficient search has been made for it, or whether it comes out of the proper custody. In all these and the like cases, the judge, as is well known, is called upon to decide questions of fact.

It may here be worth while to cite the remarks of Sir W. D. Evans, who is certainly no mean authority on this, or on any other legal question. "Where, in point of reason," says that profound writer, "is the objection to proof by comparison of hands, as founded upon an inspection at the trial?" "What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind,—with the image and copy of the supposed reality? And when the comparison is made, not with this imperfect and fallacious copy, but with an undisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the

<sup>1</sup> *Doe v. Suckermore*, 5 A. & E. 706, 707., per Coleridge J.; 2 St. Ev. 516.

assistance which it may be naturally expected to afford.”<sup>1</sup> Even Mr. Starkie, who appears, on the whole, to be in favour of the rule as it exists, is forced to admit, “that abstractedly a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party’s handwriting, than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention.”<sup>2</sup> It has been urged that this is an unfair mode of stating the argument, since the weakest possible degree of knowledge which can arise from seeing a person write, is contrasted with the strongest possible degree which can arise from a direct comparison<sup>3</sup>; but, admitting this to be the case, we are prepared to go much further than Mr. Starkie, and to contend that in almost every case a jury would be more likely to come to a correct conclusion, were they allowed to compare, in their own way, the paper in dispute with a proved or acknowledged autograph<sup>4</sup>, than they now are, when called upon to pronounce a verdict on the evidence of a witness, who of course comes prepared to give favourable testimony on behalf of the party who calls him, who runs little risk of incurring the penalties of perjury, since he is only required to state his *belief*, and who, moreover, has seldom had an opportunity of acquiring any great familiarity with the character of the handwriting on which he undertakes to pass an opinion. To illustrate the argument by referring to “twins, who may present no observable diversity to a *stranger*, and yet be distinguished at a glance by their *parents*,” is to advance a position at least as unfair as that stated by Mr. Starkie; for it assumes, that all witnesses have acquired a most intimate knowledge of the handwriting

<sup>1</sup> 2 Evans’s Poth. Law of Obl. 185., App. No. 16. s. 6.

<sup>2</sup> 2 St. Ev. 516.

<sup>3</sup> Doe v. Suckermore, 5 A. & E. 734, 735., per Patteson J.

<sup>4</sup> In order to prevent the opposite party from being taken by surprise, a provision might be made, that papers should not be laid before the jury for the purpose of comparison, unless such papers had, previously to the trial, been submitted to the inspection of the adversary, and notice had been given of the course about to be pursued.

<sup>5</sup> Doe v. Suckermore, 5 A. & E. 745., per Lord Denman.

which they are called upon to prove. Yet does the law demand the production of such witnesses, or are they in fact produced? Most assuredly not. Besides, the argument at best amounts to this, that persons well acquainted with the character of handwriting, are more competent than utter strangers to judge whether a document bears that character; a proposition, which, however true, does not touch the question, whether it be more expedient to have recourse to indirect, than to direct, comparison. The fact, if it be one, that persons are apt to form fanciful conclusions from comparison of handwriting, some dwelling on the general character, some on the peculiar turn of a particular letter, and others on more minute circumstances of similitude or discrepancy, which may be wholly accidental, has been strangely twisted by one learned judge into an argument in favour of the present rule<sup>1</sup>: but no fallacy can be more apparent than this; for, admitting that the fact is so, the only deductions derivable from it are,—first, that the power of proving handwriting by comparison cannot be safely entrusted to a *witness*, or even to a single judge,—secondly, that a jury should not be enabled to institute such a comparison for the purpose of *disproving* handwriting,—and lastly, that it may be impolitic for a party to rely on this mode of proof, in consequence of the difficulty of securing the suffrages of twelve men on a subject respecting which opinions confessedly differ so largely.

The principle of direct comparison, which we here advocate, has been long recognised and acted upon by the common law courts with respect to other matters. Thus, if a prisoner be charged with stealing wheat, and the question turn on the identity of that found in his possession with the corn belonging to the prosecutor, it is every day's practice to produce parcels from each lot, and to call upon the jury to compare them together, with or without the aid of witnesses; and no one dreams of contending that such a comparison is not more satisfactory, than if the farmer, who grew the wheat, and is therefore well acquainted with its character, were asked to speak to the identity of the lot found on the prisoner, by vaguely comparing it with the exemplar of his

<sup>1</sup> Doe v. Suckermore, 5 A. & E. 735., per Patteson J.

own corn which memory had formed in his mind. Then, if this be the case, — and that it is so with respect to numerous questions of identity, is a proposition which admits of no doubt, — why is not the same principle to prevail, when the issue turns on the genuineness of handwriting? The same collateral issues may arise in all these cases, but while danger is *apprehended* from this cause in matters of handwriting, none whatever is *experienced* in all other inquiries of a kindred nature. The analogy, on principle, is complete; and no satisfactory reason can be given, why the practice should be different.

In the Ecclesiastical Courts, witnesses skilled in the examination of handwriting and detection of forgeries have been permitted for centuries to depose to their opinion, upon direct comparison of the writing in question with other documents admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; and that, too, though the specimens on which the comparison is founded may be wholly irrelevant to the cause.<sup>1</sup> In France the same doctrine prevails, at least to a limited extent<sup>2</sup>; and in America, though some of the States have adopted the English rule, others have altogether rejected it; while a few have received it subject to considerable modifications.<sup>3</sup> It will be

<sup>1</sup> 1 Will. on Ex. and Ad. 260.; 1 Oughton, Ord. Jud. tit. 225. ss. 1—4.; Doe v. Suckermore, 5 A. & E. 708—710., per Coleridge J.; Beaumont v. Perkins, 1 Phillim. 78.; Saph v. Atkinson, 1 Add. 215, 216.; Machin v. Grindon, 2 Cas. temp. Lee, 335.; 2 Add. 91. n. (a) S. C.

<sup>2</sup> Code de Proc. Civ. part. i. li. 2. tit. 10. s. 193—213.; Pothier, 3 Œuv. Posth. 46.; Doe v. Suckermore, 5 A. & E. 710, 711., per Coleridge J.

<sup>3</sup> In New York, Virginia, and North Carolina, the English rule is adopted, and such testimony is rejected. Jackson v. Phillips, 9 Cowen, 94. 112.; Titford v. Knott, 2 Johns. Cas. 210.; Rowt v. Kile, 1 Leigh, R. 216.; The State v. Allen, 1 Hawks, 6.; Pope v. Askew, 1 Tredell, R. 16. In Massachusetts, Maine, and Connecticut, it seems to have become the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting. Homer v. Wallis, 11 Mass. 309.; Moody v. Rowell, 17 Pick. 490.; Richardson v. Newcomb, 21 Pick. 315.; Hammond's case, 2 Greenl. 33.; Lyon v. Lyman, 9 Conn. 55. In New Hampshire and South Carolina, the admissibility of such papers has been limited to cases where other proof of handwriting is already in the cause, and for the purpose of turning the scale in doubtful cases. Myers v. Toscan, 3 N. Hamp. 47.; The State v. Carr, 5 N. Hamp. 367.; Bowman v. Plunkett, 3 M'C. 518.; Duncan v. Beard, 2 Nott & M'C. 401. In Pennsylvania,

seen, by referring to the last note, that the American decisions do not add much weight to either side of the argument; and they are here noticed, rather as furnishing to the curious reader ample sources for further investigation, than as affording a safe, or indeed an intelligible, guide on which to rely. If it were possible to extract from these conflicting judgments a rule which would find support from the majority of them, perhaps it would amount to this: that such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them; that is, where the papers are either conceded to be genuine, or are such as the other party is precluded from denying; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony.<sup>1</sup>

In thus discussing at length the general rule of law, which rejects all proof of handwriting by direct comparison, and in venturing to question the validity of the principles on which this rule is founded, it is not intended for a moment to deny the existence of the rule, but simply to advocate, however feebly, the adoption of another system; and, acknowledging the rule to be the law of the land to the fullest extent, it now becomes necessary to advert to *two exceptions*, which have been recognised in courts of justice with more or less distinctness. First, where *other documents, admitted to be genuine, have already been produced as evidence in the cause, the jury may compare them with the writing in dispute*. The reason assigned for this exception is, that, as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the Court, to examine the documents for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause.<sup>2</sup> In fact,

the admission has been limited to papers conceded to be genuine. *M'Corkle v. Binns*, 5 Binn. 340.; *Lancaster v. Whitehill*, 10 S. & R. 110.; or concerning which there is no doubt. *Baker v. Haines*, 6 Whart. 284.

<sup>1</sup> *Smith v. Fenner*, 1 Gall. 170. 175. See also *Goldsmith v. Bane*, 2 Halst. 87.; *Bank of Pennsylvania v. Haldemand*, 1 Pennsylv. R. 161.; *Sharp v. Sharp*, 2 Leigh, 249.

<sup>2</sup> 20 *Law Mag.* 323, 324.; *Griffith v. Williams*, 1 C. & Jer. 47.; *Solita v. Yarrow*, 1 M. & Rob. 133., per *Ld. Tenterden*; *Bromage v. Rice*, 7 C. & P. 548., per *Littledale and Patteson Js.*; *Hammond's case*, 2 Greenl. 33.

it is impossible to prevent the comparison, and therefore the exception may be said to rest on necessity.<sup>1</sup> Moreover, this course is supposed to be the less inconvenient, inasmuch as documents which are put in for other purposes would be free from all suspicion of having been unfairly selected.<sup>2</sup> It seems, however, that this last reason would not be universally applicable, since, if a paper happens to be admissible in its own nature, as bearing in however slight a degree on the cause, it cannot be rejected, though it is avowedly put in for the sole purpose of enabling the jury to compare it with another document in dispute.<sup>3</sup> When the holder of a bill, which has been indorsed to him by the drawer, brings an action against the acceptor, who by his plea denies the indorsement alone, the jury cannot compare the indorsement with the drawing, and thus find a verdict for the plaintiff without the intervention of a witness, though the acceptance admits the drawing to be correct, and this is further confirmed by a subsequent acknowledgment by the defendant.<sup>4</sup>

Secondly, where documents are of such antiquity that witnesses who have held a correspondence with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases.<sup>5</sup> It is well known that, as a general rule, such documents, when thirty years old, prove themselves; but, nevertheless, there are occasions, when, in order to establish identity, it becomes necessary to prove the handwriting. For instance, if, in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, or if it be required to show the identity of the writer of two ancient documents, only one of which is admissible in the cause, the handwriting must be proved in some legal mode,

<sup>1</sup> *Doe v. Newton*, 5 A. & E. 514.; 1 N. & P. 1. S. C.; *Eaton v. Jervis*, 8 C. & P. 273., per Gurney B. For another application of the same principle, see the judgment of Coleridge J., in *Wright v. Doe d. Tatham*, 4 Bing. N. C. 500.

<sup>2</sup> *R. v. Morgan*, 1 M. & Rob. 135. n., per Bolland B.

<sup>3</sup> *Waddington v. Cousins*, 7 C. & P. 595, per Ld. Denman.

<sup>4</sup> *Allport v. Meek*, 4 C. & P. 267., per Tindal C. J.

<sup>5</sup> *Doe v. Suckermore*, 5 A. & E. 717, 718., per Coleridge J.; 724, 725., per Williams J.; 736., per Patteson J.; 747, 748., per Ld. Denman.

however ancient the paper may be.<sup>1</sup> The question, then, remains, how is this to be done? Till within a recent date, it has been thought that the proof might be established in one or both of two ways, — either by producing other documents, admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and then permitting witnesses, whether experts or others, and perhaps even the jury, to compare such documents directly with the paper in dispute<sup>2</sup>; or by calling witnesses, who, from a prior examination of these documents, could, without an actual comparison, pronounce their belief as to whether or not the instrument in question were written by the same hand.<sup>3</sup> But, though in the case of *Doe v. Suckermore* the judges of the Court of Queen's Bench, differing as they did with respect to the immediate question before them, appear to have recognised the legality, if not of both modes of proof, at least of the latter<sup>4</sup>; yet the House of Lords, by a very recent decision, have thrown much doubt on the subject, if they have not expressly overruled the practice that had hitherto prevailed.

The question arose on the claim of Sir B. W. Bridges to the Barony of Fitzwalter<sup>5</sup>, when it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years ago by the ancestor of the claimant, was in fact written by him. To establish this fact, an inspector of official correspondence was called, who stated that he had examined the signatures attached to two or three documents which were admitted to have been executed by the ancestor; — that they were written in a

<sup>1</sup> *Tracy Peerage*, 10 Cl. & Fin. 154.; *Fitzwalter Peerage*, id. 193.; *Morewood v. Wood*, 14 East, 328.; *Taylor v. Cook*, 8 Price, 652.

<sup>2</sup> *Davies v. Lowndes*, 7 Scott, N. S. 168, 169. 209.; *Doe v. Tarver*, Ry. & M. 143., per Abbott C. J.; *Anon.* cited id. per Lawrence J.; *Roe v. Rawlings*, 7 East, 282. n., per Le Blanc J. on two occasions; *Morewood v. Wood*, 14.; *East*, 328., per Hotham B.; *Taylor v. Cook*, 8 Price, 652, 653., per Richards C. B.

<sup>3</sup> *Sparrow v. Farrant*, 2 St. Ev. n. (e), per Holroyd J.; *Doe v. Lyne*, 1 Ph. Ev. n. 1., per id.; *Beer v. Ward*, cited id., per Dallas C. J.; *Anon.*, per Ld. Hardwicke, cited B. N. P. 236. (b).

<sup>4</sup> *Antè*, p. 296. note 5.

<sup>5</sup> *Fitzwalter Peerage*, 10 Cl. & Fin. 193.

remarkable character; and that his mind was so impressed with that character, as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. The Attorney-General having objected to the testimony of this witness, on the ground that he had gained his knowledge of the handwriting, *not from a course of business*, like a party's solicitor or steward, but from *studying* the signatures for the *express purpose* of speaking to the identity of the writer, the Lord Chancellor and Lord Brougham were clearly of opinion that the testimony was inadmissible; the latter noble lord observing, that the cases of *Doe v. Tarver* and *Sparrow v. Farrant*<sup>1</sup>, if correctly reported, had gone farther than the rule was ever carried; that the Lord Chief Justice entertained the same views on this last subject; and that if, as was doubtless the case, such kind of evidence had been often received, it was only because no objection had been raised. The family solicitor of the claimant was then called; and having stated that he had acquired a knowledge of the ancestor's handwriting from having had occasion, at different times, to examine, *in the course of his business*, many deeds and other instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. The distinction drawn between these two witnesses is obvious. The former had studied the signatures admitted to be genuine with the avowed purpose of discovering a similitude between them and the writing in dispute, and might well be supposed to bring to the investigation that bias in favour of the party calling him which is proverbially displayed by scientific witnesses<sup>2</sup>; the latter had acquired his knowledge incidentally and unintentionally, under no circumstances of prejudice or suspicion; and, what is especially worthy of remark, without reference to any particular object, person, or document.<sup>3</sup> Coupling this decision with the case of *Brookbard v. Woodley*<sup>4</sup>, in which Mr. Justice Yates re-

<sup>1</sup> Antè, p. 297. notes 2. and 3.

<sup>2</sup> Tracy Peerage, 10 Cl. & Fin. 191., per Lord Campbell.

<sup>3</sup> Doe v. Suckermore, 5 A. & E. 731. 735., per Patteson J.

<sup>4</sup> Pea. R. 21.



fused to permit the proof of an old paper by comparison, it may perhaps be stated as the better opinion, that, in strict law, the handwriting of *ancient* documents must be proved by some witness who has become acquainted with it in the ordinary course of his business, and that it will not be allowable either to call a scientific witness, who has obtained his knowledge by studying other documents in the same handwriting, or to produce such documents to the jury, provided they be not admissible for some other purpose, in order to enable them to form a comparison.

But, be this as it may, the case of the Fitzwalter peerage furnishes a strong *à fortiori* argument in favour of the rejection of a skilled witness, who is called to prove or disprove the signature of a *modern* instrument, and whose sole knowledge of the handwriting has been derived from the study of other papers, which are proved or admitted to have been written by the party whose signature forms the matter in dispute. It may therefore be safely affirmed, that the arguments of Mr. Justice Coleridge and Mr. Justice Patteson, who, in *Doe v. Suckermore*, would have rejected such testimony, are consistent with sound law as at present understood.<sup>1</sup> Whether a witness, who has in his possession a paper which he has seen the party write, or which he has received from the party in the course of correspondence, can recur to it at the trial for the purpose of refreshing his memory, is a question which admits of much doubt. Such a course was permitted on one occasion by Mr. Justice Dallas<sup>2</sup>; but the correctness of this ruling, though apparently recognised by

<sup>1</sup> 5 A. & E. 703.; 2 Nev. & P. 16., S. C. In this case a defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, eighteen other signatures were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, who had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard in Court. Per Ld. Denman C. J. and Williams J., such evidence was receivable; per Patteson and Coleridge Js., it was not.

<sup>2</sup> *Burr v. Harper*, Holt, N. P. R. 420.

one learned judge, has been expressly questioned by another<sup>1</sup>; and as the leaning of the courts, for some years past, has been rather to limit, than to enlarge, the rule respecting proof of handwriting, it is presumed that this practice would not now be allowed. It is true that, in such a case, there is little danger of an unfair selection of specimens, and therefore, so far as that danger constitutes the ground for rejecting comparison, it does not apply; but the practice is still open to the objection, that it enables the witness to speak to his belief, not from the *revived* impression on his mind, but from a *new* impression made during the progress of the cause, in a manner that the law does not sanction.

Though scientific witnesses cannot, as before mentioned<sup>2</sup>, prove ancient or modern documents, either by actual comparison, or by studying other papers for the purpose of qualifying themselves to give evidence respecting the document in dispute, it seems that their testimony will be admissible in *two cases*. First, if the writing be *ancient*, they may state their belief as to the probable *period* at which it was written, because, as the character of handwriting varies according to the progress of civilisation, antiquarian knowledge may afford much assistance in arriving at a right conclusion<sup>3</sup>; and, secondly, if the question be whether a paper is written in a *feigned* or *natural* hand, witnesses whose duty it has been to detect forgeries will perhaps be admissible in this country, as they certainly are in America<sup>4</sup>, on the ground that such persons are supposed to be more capable than ordinary men to pronounce a safe opinion on a subject of this nature.<sup>5</sup> Still,

<sup>1</sup> In *Doe v. Suckermore*, 5 A. & E. 724., Williams J. cited *Burr v. Harper* as sound law, but Patteson J. denied that the decision was right, p. 737.

<sup>2</sup> *Ante*, p. 297—299.

<sup>3</sup> *Doe v. Suckermore*, 5 A. & E. 718., per Coleridge J.; *Tracy Peerage*, 10 Cl. & Fin. 154.

<sup>4</sup> *Hammond's case*, 2 Greenl. 33.; *Moody v. Rowell*, 17 Pick. 490.; *Comth. v. Carey*, 2 Pick. 47.; *Lyon v. Lyman*, 9 Conn. 55.; *Hubly v. Vanhorne*, 7 S. & R. 185.; *Lodge v. Phipper*, 11 S. & R. 333. In America, the skilled witness may compare the writing in a feigned hand with other writings already in evidence in the cause. See cases above.

<sup>5</sup> *R. v. Cator*, 4 Esp. 117. 145., per Hotham B.; *Goodtitle v. Braham*, 4 T. R. 497.; *Doe v. Suckermore*, 2 Nev. & P. 18.; *Fitzwalter Peerage*, 10 Cl. & Fin. 198., per Ld. Brougham. See *Gurney v. Langlands*, 5 B. & A.

as experts usually come with a bias on their minds to support the cause in which they are embarked, little, if any, weight will be attached to their evidence<sup>1</sup>, and the Courts will jealously take care that their answers are confined within the strict bounds of the exception. Thus, on the trial of an information for a libel, a post-office clerk, though permitted to state his belief that the libel was in a feigned hand, was not allowed to examine a letter written by the defendant, and then to give his opinion as to whether the same hand wrote both papers.<sup>2</sup> This was clearly an act of comparison, and the fact, if it was one, that the handwriting of the libel was in a disguised character, was not considered a sufficient reason for varying the general rule.

There is one remaining point connected with this subject, on which doubts are still entertained; we allude to the question, how far the knowledge of a witness, who is called to prove handwriting, may be tested by showing him other documents, not admissible as evidence in the cause, and then asking him whether they are written by the same hand as the paper in dispute? Mr. Baron Parke, some years back, not only permitted this course to be adopted, but allowed all the papers to be shown to the jury, in order that they might see the degree of credit to which the witness was entitled<sup>3</sup>; but in *Griffits v. Ivory*<sup>4</sup>, where, several witnesses being called to establish a signature, the opposite party proposed to ask each of them whether another irrelevant paper was written by the same person, purposing to test their knowledge by the

330., where Wood B. having rejected such evidence, the Court refused a new trial, and *Carey v. Pitt*, Pea. Add. R. 130., where Ld. Kenyon acted in the same manner as Wood B. See also the observations of Ld. Denman in *Doe v. Suckermore*, 5 A. & E. 751.

<sup>1</sup> *Tracy Peerage*, 10 Cl. & Fin. 191., per Ld. Campbell; *Gurney v. Langlands*, 5 B. & A. 330.

<sup>2</sup> *R. v. Cator*, 4 Esp. 117. 145, 146., per Hotham B. Persons who feel an interest in tracing a similarity between feigned and natural handwriting, are referred to the 4th vol. of Lord Chatham's Correspondence, where, at p. 37. of the fac-similes of autographs, they will find a curious comparison of the upright writing of Junius with the running hand of Sir Philip Francis.

<sup>3</sup> Per Parke B., in *Hughes v. Rogers*, 8 M. & W. 125. His lordship's ruling was not afterwards questioned, though a bill of exceptions was tendered. Id.

<sup>4</sup> 11 A. & E. 322., 3 P. & Dav. 179.

agreement or disagreement of their testimony on this point, the Court of Queen's Bench decided that the question could not be put; and Lord Denman added, that it was immaterial whether it could or could not be proved that the paper, used as a test, was written by the party whose signature was disputed. This decision has been since acted upon by Mr. Baron Parke in one case at Nisi Prius<sup>1</sup>, but the Court of Exchequer has very recently questioned the soundness of the rule as laid down in the Court of Queen's Bench.<sup>2</sup> The question thus arose: A witness, being called to disprove an acceptance, which was signed "Robert Honner," gave as a reason for denying the genuineness of the signature, that the acceptor always signed his name "R. W. Honner." The opposite counsel, in cross-examination, put into his hand another irrelevant document, which was signed in the same manner as the acceptance, and the witness having admitted that this was written by the acceptor, he was asked whether the document was not signed "Robert Honner," and whether he would persevere in saying that the acceptor always signed his name "R. W. Honner?" An objection being taken to this course of cross-examination, Mr. Baron Alderson, after consulting the full Court, stated, that all the barons were of opinion that the question might be put<sup>3</sup>, observing, that if in the document, which the witness admitted to be an autograph, the peculiarity existed on which he relied, as disproving the genuineness of the signature in dispute, that must be a circumstance by which to test the value of his belief on the subject. His Lordship added, that if the witness had denied the genuineness of the document produced as a test, he should not have allowed any issue to be raised on

<sup>1</sup> Per Parke B., in *Hughes v. Rogers*, 8 M. & W. 125.

<sup>2</sup> *Young v. Honner*, 2 M. & Rob. 537.; 1 C. & Kir. 51. S. C., nom. *Younge v. Honner*.

<sup>3</sup> In *R. v. Murphy*, 1 Arm. Mac. & Ogle, 204., Pennefather C. J. would not allow this course of cross-examination, as his Lordship considered that it must end in comparison of handwriting; but in *R. v. Caldwell*, id. 324., Perrin J. and Richards B. held that a witness, who had denied the handwriting of the paper in dispute, but had admitted the genuineness of other irrelevant documents, might be questioned as to any similarity between them, provided the passages in each supposed to be like were pointed out to the witness by the hand, and were not read aloud, so as to go to the jury.

that point.<sup>1</sup> The last part of this ruling is entirely in accordance with the case of *Hughes v. Rogers*<sup>2</sup>, where a witness having denied that the signature of an attesting witness to a bond was genuine, and having further denied that another paper, not in evidence in the cause, was written by that person, the Court decided that he could not be contradicted by calling persons to prove that this last paper was actually written by the attesting witness.

The rules deducible from these cases would seem to be these: first, that if a witness is called to prove or disprove a writing, any documents, though inadmissible in the cause, may be put into his hand on cross-examination, and he may be asked whether such documents are or are not written by the person who is supposed to have written the paper in dispute; secondly, if he denies that these documents are so written, witnesses cannot be called to contradict him, nor can the documents be shown to the jury; and lastly, if he admits that they were written by such person, he may be further cross-examined as to the reasons for the belief he has expressed respecting the disputed paper. Thus, if he considers it genuine on the ground of some peculiarity in the signature, he may be asked whether such peculiarity is observable in the paper he has admitted to be an autograph; if for the same reason he rejects the disputed writing as spurious, he may be asked whether in the paper offered as a test the same peculiarity does not prevail; and, in either case, the Court would probably permit the irrelevant documents to be laid before the jury, not that they might judge of the genuineness of the paper in dispute by comparing it with these, but that they might be enabled to appreciate the testimony given by the witness.<sup>3</sup> Whether the course proposed to be pursued in *Griffits v. Ivory* was correct or not, is another question, and one which, until some further decision is pronounced upon the subject, it would be mere speculation to attempt to resolve.

It remains only to be observed, that the rules of evidence which govern the proof of handwriting, are precisely the

<sup>1</sup> *Young v. Honner*, 2 M. & Rob. 536.

<sup>2</sup> 8 M. & W. 123.

<sup>3</sup> *Younge v. Honner*, 1 C. & Kir. 53., per Alderson B.

same in criminal as in civil proceedings; though in favour of life and liberty, judges will naturally feel more disposed than they would be in ordinary disputes between man and man, to resist any endeavour to infringe these rules, or to introduce evidence of a doubtful description.<sup>1</sup>

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ART. V. — LETTERS OF LORDS CAMDEN AND  
NORTHINGTON, ETC.

THE important station which the Duke of Grafton (grandfather of the present Duke) very long filled in the councils of this country is well known. His intimate connection with Lord Chatham and Lord Camden is also known. But the persevering slanders of Junius, who bore a personal hatred to the Duke of Bedford, and assailed the Duke of Grafton as head of the ministry which the Bedford party joined, have obscured the reputation of as honest a statesman and as sensible and prudent a man as ever directed the councils of England. This is not the place for undertaking his Grace's defence against that unprincipled and much overrated writer. But having been honoured with the permission of the present Duke to make public one or two of the valuable letters in his possession, we are much gratified in laying before our readers three from Lord Camden, one from Lord Northington, and one from Lord Chatham; because these refer to matters which have an interest with professional men.

When the last administration of Lord Chatham was formed, in 1766, he accepted an earldom, and his steady friend Lord Camden quitted the Common Pleas for the Great Seal, Lord Northington became President of the Council, the Duke of Grafton remained First Lord of the Treasury, and Lord Chatham took the Privy Seal, but was avowedly Prime Minister. The first of the following letters was written from Bath, whither he had gone to free himself from that very

<sup>1</sup> *R. v. Cator*, 4 Esp. 117. 144., per Hotham B.; *R. v. De la Motte*, 21 How. St. Tr. 810., per Butler J., and see 779. S. C.

severe attack of gout which in the following spring reduced him to such a feeble state of body, and so nervous and depressed a condition of spirits, that he was for many months wholly incapable of attending to business of any description. The story of his derangement was a mere fable; for while he was at the very worst the Duke of Grafton had an interview of two hours with him at his villa of North End, in May, 1767, and, discussing with him every subject of public affairs, took his opinion upon all points, but he was in a state of extreme nervousness and debility. The terror of his name most wonderfully continued to protect the ministry through all the time that he remained, as it were, in abeyance.

*Earl of Chatham to the Duke of Grafton.*

Bath, October 19th, 1766.

MY DEAR LORD,

It is with much difficulty and at the same time with peculiar pleasure that I attempt a few lines to return your Grace my respectful and warm thanks for the honour of several most obliging letters. That of the 17th <sup>1</sup> just received gives me great satisfaction, as it informs me of a very agreeable conclusion to a matter which I confess gave me much uneasiness.

As to the phalanx your Grace mentions, I either am full of false spirits infused by Bath waters, or there is no such thing existing. The gentleman <sup>2</sup> your Grace points out as a necessary recruit, I think a man of parts and an ingenious <sup>3</sup> speaker. As to his notions and maxims of trade, they can never be mine. Nothing can be more unsound or more repugnant to every first principle of manufacture and commerce than the rendering so noble a branch as the cottons dependent for the first materials upon the produce of French and Danish islands instead of British. My engagements to Lord Lisburne for the next opening at the Board of Trade is already known to your Grace; nor is it a thing possible to waive for Mr. Burke.<sup>4</sup> Mr. Hussey<sup>5</sup>, I believe, is in Cornwall. That gentleman's ability and weight are great indeed, and my esteem and honour for his character the highest imaginable. I flatter myself with some share in his regard; but as to his intentions, my Lord

<sup>1</sup> On the 17th Lord Cardigan had been created Duke of Montagu.

<sup>2</sup> Mr. E. Burke.

<sup>3</sup> This is a use formerly made of the word to express great ability.

<sup>4</sup> From this it seems that you find a First Lord of the Treasury suing in vain to a Lord Privy Seal for a place at the Board of Trade.

Richard Hussey, Att.-Gen. to the Queen, and counsel to the Admiralty.

Chancellor<sup>1</sup> may possibly be more able to inform your Grace when you meet than I can promise to do. Mr. Nugent I have not yet seen, having missed him when he was so good to call.

The inclosed draft<sup>2</sup>, which is submitted to the consideration of your Grace, the Secretaries of State<sup>3</sup>, and the Chancellor of the Exchequer<sup>4</sup>, has the approbation of Lord Camden and Lord Northington. If new matter should arise before the meeting, the speech will to be sure adapt itself to the event. I have the most sensible joy in being able to acquaint your Grace, that Lord Spencer has with infinite goodness listened favourably to my earnest entreaties, and will move the address. Your Grace will be so good as to think of a seconder. I think of going about Wednesday next, for one day, to Burton Pynsent, and hope to pay my respects to your Grace in town about the 4th of November.

My hand recovers very slowly, but my general health is mended by the waters, and I trust that a second reprieve of ten days will help my hand.

I am, with truest esteem and respect,  
Your Grace's faithfully devoted  
Most humble servant,  
CHATHAM.

I hope the special commission will not be delayed.

This letter, and its humility of style, as well as the humble manner in which very insignificant men are mentioned, shows the curious habits of *speech* of the writer. The *suaviter* never went further, so as to encroach on the *fortiter*.

The next letter which we shall give is from Lord Northington, and certainly it proves that a good chancellor and great lawyer could write in the language and with the elegance as well as propriety which might better beseem a common housemaid. There are worse written letters, too, in the collection than this, and by the same person.

*Lord Northington (President of the Council, and formerly  
Lord Chancellor,) to the Duke of Grafton.*

Grainge, August 9th, 1767.

MY DEAR LORD,

My eyes would not permit me to write to your Grace by the last

<sup>1</sup> Lord Camden.

<sup>2</sup> Lords Shelburne and Hillsborough.

<sup>3</sup> King's speech.

<sup>4</sup> C. Townshend.



post, as I intended, with respect to the affairs of the Canada Legislation, and to inform you fully of my ideas on that business. I must first premise, that the formation of any plan of that kind can never commence or proceed through the office that I now enjoy, in whatever hands it shall be placed : because the Council cannot correspond with any of the King's officers there, to know the true state of that country, which correspondence alone resides in the Secretary of State. When such information is acquired by him, I am of opinion that, before a plan can be formed, which must necessarily have the sanction of Parliament, it is necessary to have the full sense of the King's servants upon that subject, that the measures may have the general support of Government, and not be thrown, as they were last year, upon one person, not in the least responsible for them. When every information is obtained, I am certain your Grace's penetration anticipates the difficulties to be encountered, not only from the civil constitution of that province, composed of French received under a capitulation, incorporated with English entitled to a legislation at some time, and who have been encouraged to call for it by the proclamation, the King's commission, and other excitements. To this, as great a difficulty succeeds, with regard to a Popish hierarchy, and of course a Protestant one ; both of which are in my opinion delicate subjects : loads too heavy to be sustained by any strength less than that of a concurring administration. I have all along been of this opinion in different administrations, and have been willing to lend my aid to this difficult task.

I hope to be able to be in London in about ten days, though I am very indifferent still.

Your Grace has heard the receiver is dead : I hope my recommendation may take place, or my credit will be very low here.

I have the honour to be, &c.

NORTHINGTON.

A letter from Lord Camden will now be inserted, on a subject of some interest at all times, and of peculiar importance at the present time. There is no need of our observing, that a more firm friend of constitutional liberty, or a man of more liberal sentiments on all subjects, never flourished in this or in any country than the writer of the following letter, though it must be borne in mind, that he was dealing with an Irish question at a time when that country's chains had not yet been broken. Ireland was then in a state of vassalage to this

country, — a state of real subjection, from which the courage and patriotism of Grattan relieved her. We mention this, not to remind the reader of the exaggerated and unwarrantable statements of the present day, when we constantly hear the genius of Grattan undervalued by vile, profligate, and mercenary demagogues, and the pretended wrongs of Ireland exalted into real grievances; but our object is to note, that Lord Camden's sentiments on Irish patronage were coloured by the perverted medium through which in those days all Irish affairs were viewed, and that there is, therefore, no blame imputable to the opinions of that great man, when writing fifteen years before the triumph of Grattan.

*Lord Chancellor Camden to the Duke of Grafton.*

Bath, September 27th, 1767.

MY DEAR LORD DUKE,

I HAVE since the receipt of your Grace's letter turned my thoughts upon the subject of it with the most serious attention, and am displeased with myself for not agreeing altogether with your Grace in conferring the Irish seal upon an Irishman. I will readily confess, that I am not a competent judge of this question, for want of knowing the true state of that country, the manner in which it has been governed of late years, the power and influence of the several connexions, and above all, the importance of the Irish bar in the House of Commons there; and therefore it is very likely that your Grace may be much better enabled than myself to form a true judgment upon the utility and policy of complimenting the Irish with the high office. Your Grace, however, has a right to my poor opinion, such as it is; and indeed, my Lord, I am very loth to give up to the unreasonable demands of two of those barristers (however eminent) the last, as well as most important law office in that kingdom, which England hitherto has thought fit to reserve to herself. All the chiefs upon each bench were formerly named from hence; the Irish have acquired the King's Bench, and the late Lord Lieutenant, for the first time, made them a present of the Chief Baron; and there has not for many years been an instance of a puisne judge sent from this country; I believe Baron Mounteney was the last.

Thus, by degrees, has this country surrendered up all the great offices of the law, except only the Common Pleas and the Great

Seal; and I much doubt whether this country acquires any advantage by all these concessions.

In the last session Mr. Flood moved a general censure upon the characters and capacity of the judges sent from England, with a view, no doubt, of inflaming the people against all these nominations, in hopes of extending their encroachments to a total exclusion of the English from the Irish Bench; and now, such is the danger of precedent, they threaten general opposition (for so I understood from Lord Clare,) if this favour is refused; and your Grace seems to think it will be an affront upon the next Council there.

Jocelyn and Bowes, though both Englishmen, are honoured with the appellation of Irish for the present purpose, and are cited as precedents in their favour. I am very apprehensive, that if your Grace should indulge now the Irish in this *demand* (for I can call it by no other name), the precedent will bind England for ever; for national favours once conferred can never be resumed. Ireland has reason enough to be discontented with the mother country: the popular party are sure to distress the Castle to some degree every session, and the method has been hitherto to win over the leaders in the House of Commons by places, pensions, and honours, which has enabled the Lord Lieutenant for the time being to close his particular session with ease to himself; at the same time that it has ruined the King's affairs, and enraged the people. The next successor is involved in the same difficulties, and his convenience has been complimented by the like measures; till, at last, by this profusion of rewards, the Government has nothing to give, and is left beggared, and consequently unsupported. In such a state of things, would your Grace wish to pursue such a plan, and grant now, before the opening of the session, the highest post in the law to one member only of the House of Commons (for only one can have it), whose removal afterwards to make room for an Englishman (let his behaviour be ever so obnoxious) would be a most odious and unpopular measure in that country? An Englishman in the office is expected to remain an Englishman, and is permitted; an Irishman anglicised would never be endured. Indeed, my Lord, the very yielding, in my humble opinion, would be a weakening of government, and be more pernicious than the most troublesome session.

I am truly sensible of Lord Townshend's embarrassments, and foresee that, if he should obtain this boon, he must expect to meet with some very disagreeable struggles. But, I dare say, his zeal, courage, and ability are equal to the whole, and I am sure he will

cheerfully undertake what he has accepted, though your Grace should adhere to our first opinion, of keeping the Seal, for the present, in commission.

Your Grace takes it for granted that no proper person can be had from hence at present. Sir T. P. (who was not perhaps the properest) has refused, and no other person has yet been applied to. Suppose the Attorney or Solicitor should decline it, perhaps Mr. T. Bathurst might accept. I am sure Messrs. T. Aston or Hewett would be pleased with it ; who, if not of the most shining parts, are yet good lawyers, and sensible men, and, I am sure, of very sufficient abilities to command respect from the Irish Bar ; and I should not, for my own part, have had difficulty in the nomination of either of them *at this time*, but I submitted to the opinion of others for the commission, thinking that this expedient might be the means of carrying Lord T. through the session with more facility.

Your Grace will be pleased to consider that the Chancellor, Chief Baron, and Chief Justices are called to the Council in Ireland in the quality of statesmen, and that the Council in that country is an assembly of equal importance of either of the branches of the legislature. If the Lord Lieutenant is surrounded with Irish only filling these offices at the board, he is subject to be overruled in every quarter by the great chiefs of the law, in which case I doubt he must submit.

But if your Grace should at last be determined to name an Irishman, you will please to consider whether Sir A. Malone is not clearly the properest person. He has not indeed applied for it, but I understand he would be happy with the offer ; and such is the deference to his superior character, that every one of those gentlemen who has applied have put themselves only in the second place after him. So that, if your Grace is resolved upon an Irishman, "*Detur dignissimo!*" Let it carry with it a march of public spirit, at the same time that it is a management of parties. I know your Grace will forgive my frankness : this is my present opinion, though I will most willingly submit to a contrary determination, and when your Grace has done it, I shall say in public that it is well done ; indeed, I shall go near to think so, because I am sure the decision will be taken by those who understand Ireland better than I do.

I presume your Grace has asked Lord N———'s<sup>1</sup> opinion upon this subject ; that will have great weight with me, as well as your

<sup>1</sup> Lord Northington's.

Grace. He used to think as I do, as did Lord Chatham; but different circumstances may well bring about a change of opinion.

I know your Grace will be anxious to hear some news of Lord Chatham; if I had been able to have given you any authentic intelligence of his amendment to any considerable degree, I should have wrote before. The whole country in his neighbourhood report him much better; but his knocker is tied up, and he is inaccessible. I read a letter from Lady Chatham yesterday, who is so fearful of owning my Lord to be better that she retracts it, even while she is admitting it in the same sentence, and conveys hopes of his recovery while she forbids them. I verily believe he is considerably mended.

I propose to be in town on Monday morning, the 7th of next month, to prorogue the Parliament, at eleven o'clock in the morning, if your Grace will be so good as to order the proper preparations,—to go to Court,—to swear in Lord North, and set out immediately for my return. I hope this will be permitted.

I have the honour to be, with the most perfect respect and esteem, your Grace's

Most obedient faithful Servant,

CAMDEN.

The next letter which we shall give relates to another and more recent period. Lord Chatham had been removed from the scene, and his son was prime minister, after completely defeating the coalition of the Whigs and Lord North's party. He had made a very earnest but fruitless attempt, upon taking the government, at Christmas, 1783, to obtain the Duke of Grafton's accession as a member of his cabinet. The Duke, looked up to by all parties, and exerting a powerful influence both with the court and the country, had retired into private life, thoroughly disgusted at the coalition, having before left office from disapproval of the American war, then under Lord North's guidance. His personal friendship for Mr. Fox, and his zealous attachment to Whig principles, had failed to win him over to the measures which he regarded as an abandonment of all principle, and Mr. Fox had in vain endeavoured to make him view this proceeding with less repugnance. After the dissolution had consummated Mr. Pitt's victory, and seated him firmly in power, he was still most anxious to obtain the Duke's aid and co-operation, with the view of

giving his ministry more of a Whig character than it could be expected to derive from the Sidneys, and the Gowers, and the Thurlows who composed his very small cabinet. Lord Camden had been with much difficulty induced to join him, as President of the Council; he had consented upon condition that his valued friend and political chief (since Lord Chatham's death), the Duke of Grafton, should also enter the cabinet. His Grace had agreed to do so on condition that his friend Lord Carmarthen (afterwards Duke of Leeds) should vacate his place of Foreign Secretary of State with his own entire assent. It was during the delay which these delicate scruples occasioned that the following, among many other letters, were written by the venerable Lord President, who retained his station till 1794, but was disappointed of the Duke of Grafton's junction with the cabinet, by the irreconcilable differences of opinion which soon after separated him from Mr. Pitt, first on occasion of the Russian armament, next on the French war. The former measure also lost him Lord Carmarthen's support, but the Duke could not now, agreeing with his Lordship, succeed to his place.

*Lord Camden to the Duke of Grafton.*

Oct. 18th, 1784.

MY DEAR LORD,

You may be assured that nothing has happened, since I had the honour of writing to your Grace, worth the trouble of a letter; nor should I now have written but that I am to set out to-morrow for Wales, where I shall probably be detained a fortnight; and it is not fit your Grace should remain all that time in ignorance of what is going forward. I have not seen Mr. Pitt since my last, owing to my absence from London, and his frequent journeys to Brighthelmstone, where he went again yesterday; and there he proposes opening his purposes to Lord C.<sup>1</sup> by letter, as conceiving that a better way than first to break it by a personal conference. He has no doubt that he shall be able to prevail, *with the entire satisfaction of Lord C.*; for he understands that neither your Grace nor myself will in any other way consent to his removal; and that Mr. Pitt might be perfectly apprised of your Grace's

<sup>1</sup> Carmarthen.

sentiments in that particular, I read that part of your letter to my son, in order to let Mr. Pitt know that Lord C.'s free consent and willingness were indispensable to this arrangement. And, indeed; he is under such obligations to his Lordship, that he is bound, by every tie of honour and gratitude, to leave the measure to his option and good pleasure; so that your Grace may be assured that there can be no impediment to your Grace's acceptance from that quarter. If that difficulty is removed, I should hardly allow your Grace's plea of disability, or fear to undertake so arduous an employment, to have the weight of an insurmountable objection. If that was sufficient in your Grace, who are now in the very vigour of your age and the ripeness of your understanding, to warrant a refusal, what can it be said to me, who am in the last stage of life, when both mind and body are in a state of decline, and are every day tending downwards towards incapacity. In reality, such is my backwardness to embarking in business, that nothing but the comfort of your Grace's support and co-operation could have prevailed upon me to alter my determined purpose (for so it was till I was overruled) for final retirement. And I am afraid, if I know my own feelings, I should perhaps be pleased at my heart, and almost thank your Grace, if you should, by withdrawing yourself, give me an honest excuse for breaking off. But indeed, my dear Lord, there is a great difference between us; and the disadvantage of the comparison is all of my side.

It were very much to be wished that the Privy Seal might return to your Grace, and Lord Gower shifted to some great court office; but his Lordship, it seems, is too fond of the cabinet to quit that situation; and yet I heard lately, from Lord Sydney, that he was afflicted with a frightful and alarming disorder in his eyes, so as to become incapable of either reading or writing. He described it as a very serious malady; if it should continue, or grow worse, he must, whether he will or no, bid adieu to all business. I am again asked, whether your Grace is so absolutely determined against the post of the Home Secretary. I answered, as I did before, it was my opinion you was, though it was said, that office was now relieved from the single responsibility of India matters by the establishment of the Board of Control. As I have not seen Mr. P., all that has passed between us has been conveyed by my son. I hear no news, such is the barrenness of the present times; and the newspapers themselves are dry, and can hardly find scandal enough to fill the pages. I have read the Dean of St. Asaph's trial, and confess that I can see nothing libellous in the paper; and am besides more displeased with judge Buller's behaviour

than I was formerly with Lord Mansfield's conduct. Something ought to be done to settle this dispute; otherwise the control of the press will be taken out of the hands of the juries in England, and surrendered up to the judges.

I am, my dear Lord,

&c. &c.,

CAMDEN.

These valuable letters are extracted from a MS. of singular interest, in the Duke of Grafton's possession, and to which we have had access. It is a narrative of his distinguished grandfather's public life, by himself, written in 1804, when he had attained a venerable old age, and was universally respected and beloved for his amiable qualities, as well as his eminently sound and practical judgment. Nothing can be more desirable than the publication of this excellent work; it is filled with letters from the most eminent persons of the day, and very unlike some very reprehensible publications lately made, and its being given to the world now would be wholly unobjectionable.

The last letter, which we avail ourselves of his Grace's kind permission to insert, relates to a very memorable event. Who does not know the "*Death of Chatham?*" Here is an account of his fall in the House of Lords, by an eye-witness, and that eye-witness a man almost as illustrious as himself, his bosom friend Lord Camden, in a letter to the ex-minister, the Duke of Grafton, the old and attached colleague of both in the public service. Such a document is of inestimable value.

*Lord Camden to the Duke of Grafton.*

April, 1778, N. B. Street.

MY DEAR LORD,

I CANNOT help considering the little illness which prevented your Grace from attending the House of Lords last Tuesday, to have been a piece of good fortune, as it kept you back from a scene that would have overwhelmed you with grief and melancholy, as it did me, and many others that were present: I mean Lord Chatham's fit, that seized him as he was attempting to rise and reply to the Duke of Richmond; he fell back upon his seat, and was to all



appearance in the agonies of death. This threw the whole House into confusion ; every person was upon his legs in a moment, hurrying from one place to another, some sending for assistance, others producing salts, and others reviving spirits. Many crowding about the Earl to observe his countenance—all affected—most part really concerned ; and even those who might have felt a secret pleasure at the accident, yet put on the appearance of distress, except only the Earl of M., who sat still, almost as much unmoved as the senseless body itself. Dr. Brocklesby was the first physician that came ; but Dr. Addington in about an hour was brought to him. He was carried into the Prince's chamber, and laid upon the table supported by pillows. The first motion of life that appeared, was an endeavour to vomit, and after he had discharged the load from his stomach, that probably brought on the seizure, he revived fast. Mr. Strutt prepared an apartment for him at his house, where he was carried as soon as he could with safety be removed. He slept remarkably well, and was quite recovered yesterday, though he continued in bed. I have not heard how he is to-day, but will keep my letter open till the evening, that your Grace may be informed how he goes on ; I saw him in the Prince's chamber before he went into the House, and conversed a little with him, but such was the feeble state of his body, and indeed the distempered agitation of his mind, that I did forbode that his strength would certainly fail him before he had finished his speech. In truth he was not in a condition to go abroad, and he was earnestly requested not to make the attempt ; but your Grace knows how obstinate he is when he is resolved. He had a similar fit to this in the summer ; like it in all respects, in the seizure, the reaching, and the recovery ; and after that fit, as if it had been the crisis of the disorder, he recovered fast, and grew to be in better health than I had known him for many years. Pray heaven that this may be attended with no worse consequences. The Earl spoke, but was not like himself ; his speech faltered, his sentences broken, and his mind not master of itself. He made shift with difficulty to declare his opinion, but was not able to enforce it by argument. His words were shreds of unconnected eloquence, and flashes of the same fire which he, Prometheus-like, had stolen from heaven, and were then returning to the place from whence they were taken. Your Grace sees even I, who am a mere prose man, am tempted to be poetical while I am discoursing of this extraordinary man's genius. The Duke of Richmond answered him, and I cannot help giving his Grace the commendation he deserves for his candour, courtesy, and liberal treatment of his illustrious adversary. The debate was

adjourned till yesterday, and then the former subject was taken up by Lord Shelburne, in a speech of one hour and three quarters. The Duke of Richmond answered; Shelburne replied; and the Duke, who enjoys the privilege of the last word in that House, closed the business, no other lord, except our friend Lord Ravensworth, speaking one word; the two other noble lords consumed between three and four hours. And now, my dear lord, you must with me lament this fatal accident; I fear it is *fatal*, and this great man is now lost for ever to the public; for after such a public and notorious exposure of his decline, no man will look up to him, even if he should recover. France will no longer fear him, nor the King of England court him; and the present set of ministers will finish the ruin of the country, because he being in effect superannuated, the public will call for no other men. This is a very melancholy reflection. The Opposition, however, is not broken, and this difference of opinion will wear off; so far, at least; the prospect is favourable. I think I shall not sign the protest, though in other respects I shall be very friendly. I have troubled your Grace with a deal of stuff, but the importance of the subject will excuse me. Jack will have the honour of spending his Easter at Euston. Is Lord Euston to have a commission in the militia? I have endeavoured to dissuade my son. I thank your Grace for the plover's eggs: it is plain you think me an epicure. I have hardly room to present my respectful compliments to the Duchess, &c., and to subscribe myself as I ought, with perfect esteem and respect,

Your Grace's, &c.  
CAMDEN.

P.S. I understand the Earl has slept well last night, and is to be removed to-day to Downing Street. He would have gone into the country, but Addington thinks he is too weak.

It is known that the Earl died at Hayes a few days afterwards. The Earl of M., so discreditably mentioned in this letter, must have been Lord Marchmont. In the Lords' Journals for that day, April 7. 1778, he and Lord Mansfield are the only Earls of M. present; and Lord Mansfield was wholly incapable of suffering such feelings to be seen on such an occasion.

## ART. VI. — ON THE LIEN OF SOLICITORS.

IN every profession there are some peculiar privileges, which it is the duty of its members to defend from infringement, and to transmit unimpaired to their successors. But to discharge this obligation with respect to any privilege, it is necessary to understand the principle of its origin, and the exact limits of its application; since any exorbitant or untimely assertion of such a right may be not less injurious than its undue dereliction. Rights of this nature are also liable to continual question and to frequent modification, according to the varying exigencies of society: and the subject of the present Article has of late years been so frequently brought into discussion before the highest tribunals of the land, that it seemed desirable to lay before the Profession a brief summary of the present law and practice affecting a privilege of such intrinsic importance and of such constant application.

Professional privileges have generally originated in public necessity or expediency: and they are in many cases highly conducive to the effectual discharge of professional duties. In this point of view, the privileges of solicitors, though nominally pertaining to themselves, have often been described, upon high authority, as the privileges of their clients: and such, we apprehend, is the real characteristic of the right or privilege now under consideration. The lien of a solicitor extends to funds recovered in a cause, and to all papers or documents received from the client for the purposes of the *clientela*. It is virtually a pledge, which the solicitor, upon his retainer, tacitly assumes or accepts, as a security for the future remuneration of his skill, industry, and integrity, and for the reimbursement of the heavy pecuniary outlay which the course of litigation usually imposes upon him. It is seldom that a client is called upon to advance the supplies for the conduct of his suit or business: and, were it not for

the liberality and enterprise of the solicitor by whom such affairs are undertaken, upon the sole guarantee (as it not unfrequently happens) of the privilege in question, many a just claim, now prosecuted to a triumphant result, might remain unvindicated, and much injustice might continue unredressed. It seems important to place this subject in its proper point of view, in order to enable the suitors of the kingdom to appreciate the very palpable advantages which accrue to themselves from the concession of this privilege to their solicitors. The client is apt to regard his solicitor's lien as a mere weapon of offence; and, under such circumstances, it is desirable to show that the privilege is nothing more than a just protection to the solicitor, in return for the many advantages which he has conferred upon his client during the progress of the suit or negotiation. In *Ex parte Bryant*<sup>1</sup> Sir Thomas Plumer, then Vice-Chancellor, took this view of the privilege, by describing it as "founded in equity, and in its results conducive to the interest of the suitor, and the convenience of justice."

The right of lien, in its general acceptation, consists in a power of detaining specific chattels until the holder's charges for labour and expense incurred upon them have been satisfied. Lien is of two kinds, viz. a particular lien, which extends only to the individual subject, in respect of which the charges have been incurred; and a general lien, which extends to all articles in the possession of the party claiming it, for the balance of the general account between himself and the owners of the goods.<sup>2</sup> Particular liens are encouraged by the common law, which makes every intendment in their favour: but general liens are not recognised by the common law, and they depend either upon usage or special agreement. "Growing liens," Lord Ellenborough observed, "are always to be looked at with jealousy, and require stronger proof; they are encroachments on the common law."<sup>3</sup>

"There are two kinds of lien that a solicitor has for his bill of costs; one on the funds recovered, and the other on the papers in his hands. If there be no fund and no cause, still the client cannot get back the papers without paying

<sup>1</sup> 1 Madd. 49.<sup>2</sup> 3 Bos. & P. 494.<sup>3</sup> 7 East, 229.

what is due, not only in respect of that business for which the papers were used, but for other business also.”<sup>1</sup> It appears, therefore, that the lien on funds is a particular lien; while the lien on papers is a general lien.

In *Lunn v. Church*<sup>2</sup> also, the Vice-Chancellor Leach said, that “he had not been able to find any case in which it had been held, that a solicitor had any lien on the fund recovered in the cause, except for the costs incurred in such cause;” one of the objects of the application in that case being to apply a fund towards other costs remaining due from the client to his solicitor.

It may here, therefore, not be improper to notice a case in which a contrary position seems to have been adopted by an eminent judge. In *Worrall v. Johnston*,<sup>3</sup> the plaintiffs were the assignees of a person who had been a partner of the defendants. The balance due from the defendants to the assignees was admitted and paid into court; and the suit was afterwards compromised: and it was agreed that the fund in question should be paid to the plaintiffs. Before the transfer was effected, the plaintiffs became bankrupt; and their solicitors claimed a lien, not only for the costs of the suit, but for the general costs due from the plaintiffs, upon the ground that they (the solicitors) had in their hands the deed of assignment under which the plaintiffs claimed: and Sir Thomas Plumer M. R., gave effect to this claim, saying, “The principle I go on is, that the papers, which give to the solicitor this right, must be considered as giving the same right after the suit has been prosecuted with success, as when they were antecedently in his hands. The money here is the fruit of this deed, and it can only be received through the medium of the deed.” Lord Cottenham, however, in *Bozon v. Bolland*<sup>4</sup> expressed his disapprobation of this decision in the following terms: “It appears to me that, in these observations, the distinction between the solicitor’s lien upon the fund realised in the cause, and his lien upon, or rather right to retain, the papers in his hands as solicitor, is not sufficiently kept in view. . . . If the doctrine contended for were to

<sup>1</sup> Per Sir Thomas Plumer M. R., 2 Jac. & W. 218.      <sup>2</sup> 4 Madd. 391.

<sup>3</sup> 2 Jac. & W. 214.

<sup>4</sup> 4 Myl. & Cr. 354.

prevail, the lien of a solicitor upon a fund realised would in most cases extend to his general professional demand, and not be confined, as it always is, to the costs in the cause, for it must very generally happen that the plaintiff's solicitor has in his hands the documents necessary to establish his client's title to the money." In the recent case, also, of *Hall v. Laver*<sup>1</sup>, the Vice-Chancellor Wigram clearly laid down the rule, that the lien of a solicitor upon a fund recovered in a suit which he has conducted, is confined to the costs of that particular suit; but from the same case it appears to be a doubtful point, whether a solicitor, who, in relation to the same estate, in which the same parties are interested, has brought both an ejectment and a suit in equity, has or has not a lien upon the fund recovered in the suit for his costs of the ejectment. The learned judge seemed to be of opinion that such a claim of lien could not be sustained.

We propose to consider the solicitor's lien on the fund, and his lien on his client's papers, separately and successively; and then to point out a few rules of law and practice applicable to them both indiscriminately.

1. As to lien on the fund, — Lord Chancellor Hardwicke states the foundation of this lien to be the solicitor's "expense, diligence, and costs."<sup>2</sup> "A solicitor, in consideration of his trouble and the money in disburse for his client, has a right to be paid out of the duty decreed for the plaintiff; and it is constantly the rule of this Court."<sup>3</sup> The principle is stated by Lord Kenyon in *Read v. Dupper*<sup>4</sup> to be this, "that the party should not run away with the fruits of the cause, without satisfying the legal demands of his attorney, by whose industry, and, in many instances, at whose expense, these fruits are obtained." The antiquity, however, of this lien is not very great, since, in *Wilkins v. Carmichael*<sup>5</sup>, Sir James Burrow mentioned to the Court of King's Bench, that the first instance of an attorney obtaining an order in *that* Court to stop his client from receiving money recovered in a suit until the attorney's

<sup>1</sup> 1 Hare, 571.

<sup>2</sup> Anon. 2 Ves. sen. 25.

<sup>3</sup> *Turwin v. Gibson*, 3 Atk. 720., per Lord Hardwicke C.

<sup>4</sup> 6 T. R. 361.

<sup>5</sup> Doug. 101. ed. 1783.

bill was paid, was in the case of one *Taylor*, of *Evesham*, about the time of a contested election for that borough: and Lord Mansfield said, he himself had argued the question in the Court of Chancery. The case of *Staines v. Maddox*<sup>1</sup>, seems to show that, in 1730, in Lord Chancellor King's time, the solicitor's lien on the fund was not very clearly recognised by the Court of Chancery. The case is thus briefly reported:—"By the decree in this cause, the money recovered was brought into Court, and put out for the benefit of the infants, the plaintiffs, and the defendant was to pay costs, and he being run away, the solicitor for the plaintiff moved the Court to have his bill of costs paid out of this money which was lodged in court, and insisted that a solicitor was always considered to have a lien on the money recovered, because it was by his means, and at his expense. The *procchein amy*, who was father to the plaintiffs, and very poor, and stood liable to the solicitor, joined in the motion, and the infants, the plaintiffs, did not oppose it; and the Lord Chancellor granted the motion, *but with some reluctance*." The practice seems, nevertheless, to have become quite established in Chancery in Lord Hardwicke's time: and an early case on this subject is thus reported by Dickens:—"An injunction granted upon the plaintiff's paying the money sued for into court; the parties afterwards settle the matter, and apply, without the knowledge of the defendant's solicitor, to have the bill dismissed and the money paid out of court. This coming to the knowledge of George Ward, solicitor for the defendant, the Court, on his application, ordered part of the money to be attached to answer his bill of fees and disbursements."<sup>2</sup>

This right of lien extends also to proceedings in lunacy and in bankruptcy, as appears by the following case, which came before the Lord Chancellor Hardwicke: "Petition (by solicitor) to be paid his bill of costs in taking out a commission of lunacy out of the fund of the lunatic's estate, and not to be obliged to come under the commission of bankrupt against him who took out the commission of lunacy. Lord

<sup>1</sup> *Moseley*, 319.

<sup>2</sup> *Fairland v. Enever*, 1 Dick. 114. (1746).

Chancellor: "Solicitors have this equity allowed to them to be entitlled to a satisfaction out of the fund for their expenses, whether it was in the way of suit, or prosecution in lunacy or bankruptcy."<sup>1</sup>

In another case, his Lordship further stated, that the same right extended to collateral or interlocutory proceedings, as well as to decrees.<sup>2</sup>

The same right of lien applies to damages awarded by an arbitrator. This was decided in *Ormerod v. Tate*, 1 East, 464. The cause being at issue at York Assizes in 1800, it was referred by consent to arbitration. The arbitrator awarded the defendant to pay the plaintiff 26*l.* by two instalments. The attorney of the plaintiff, hearing that the parties were going to settle the matter between themselves, so as to oust him of his costs, gave notice to the defendant not to make any payment to the plaintiff in pursuance of the award, until the lien of his attorney for costs was satisfied. The defendant, nevertheless, paid the first instalment to the plaintiff, who thereupon gave him a receipt in full; but on an application to the Court of King's Bench, the plaintiff was ordered to pay the amount which he had received to his attorney. Lord Kenyon C. J.: — "The convenience, good sense, and justice of the thing require, that an attorney should have the same lien on damages awarded, as if they were recovered by the judgment of the Court in the ordinary course of the cause. The public have an interest that it should be so: for otherwise, no attorney will be forward to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant, to cheat the attorney of his lien."

Money paid into court by the defendant in an action, is also subject to the same lien, so that if, after such a payment, the plaintiff proceed, and recover a greater sum, and then become bankrupt, a court of law will order so much of the money paid into court as will be sufficient for the purpose, to

<sup>1</sup> *Ex parte Price*, 2 Ves. sen. 407. (1751.)

<sup>2</sup> *Anon.* 2 Ves. sen. 25.



be transferred to the plaintiff's attorney, in satisfaction of his bill of costs taxed by the proper officer, and will direct the residue to be paid over to the plaintiff's assignees.<sup>1</sup>

In the application, however, of this lien, it is not allowed to interfere with the mutual rights of the parties to the cause, so as to prevent a set-off between them. Thus in *Taylor v. Popham*<sup>2</sup>, Lord Chancellor Eldon observes, that the doctrine of the *Court of Chancery* has always been, "that where, in a cause comprising a great number of questions, costs may ultimately be due to both parties, and seems to be paid as duties to each, the demands of both shall be arranged so as to do justice between them; and the lien of the solicitor is only as to those costs, which, upon the whole taken together, one party can claim for the other." In *Exparte Rhodes*<sup>3</sup>, his Lordship also laid down the same rule with respect to *bankruptcy* in the following terms:—"My opinion is, that, the practice of this Court does not interpose the lien further than upon the clear balance, which is the result of the equity between the parties."

But the right of set-off to the prejudice of the solicitor's bill, is strictly confined to the rights of the parties in the same cause. Thus, in *Mitchell v. Oldfield*<sup>4</sup>, the plaintiff had recovered judgment against the defendant for 182*l.*; but, in a subsequent action, Oldfield had recovered judgment against Mitchell and another: and Oldfield obtained a rule to show cause, why the debt and costs in the latter action should not be set off against the judgment in the former action; suggesting (among other reasons) that Mitchell had absconded. Thereupon, Mitchell's attorney in the first action showed cause against the rule, and contended that, as he was not Mitchell's attorney in the second action, he had a lien for his costs on the judgment obtained by his client: and further, that inasmuch as one debt was due to the plaintiff alone, whereas, the other was the joint debt of the plaintiff and another to the defendant, such debts could not be set off under the statute. Lord Kenyon C. J. said, that the case did not depend upon

<sup>1</sup> Beames on Costs, 318.

<sup>2</sup> 15 Ves. 75.

<sup>3</sup> 15 Ves. 539.

<sup>4</sup> 4 T. R. 123.

the statutes of set-off, but on the general jurisdiction of the Court over the suitors in it; that it was an equitable part of that jurisdiction, and had been frequently exercised: and he thought it right that the attorney in this case should be satisfied for his costs before the defendant was allowed to make the set-off. In *Randle v. Fuller*<sup>1</sup> also, there was an attempt to set off the debt and costs in another suit between the same parties against the lien of the plaintiff's attorney in the subsisting suit. But the Court of King's Bench, on the application of the attorney, refused to allow the set-off to take place to the prejudice of his lien.

Neither is the rule varied in Chancery, when an order specifically directing payment of costs by one party to another is made by the Lord Chancellor, and the order directing other costs to be paid *à contra* is made by a subordinate judge. Thus, in *Cattell v. Simons*<sup>2</sup>, a motion was made at the Rolls by the plaintiffs, that costs ordered by the Lord Chancellor to be paid by the defendant to the plaintiffs might be set off against costs ordered by the Master of the Rolls, in the same cause, to be paid by the plaintiffs to the defendant. The motion was opposed on the ground (*inter alia*) that interlocutory costs could not be ordered to be set off so as to defeat the right of the solicitor, and that the Master of the Rolls had no jurisdiction, by allowing a set-off, to vary the Lord Chancellor's order, specifically directing the costs to be paid by the defendant to the plaintiffs. Lord Langdale M. R.: "Where a party owes another 35*l.* 16*s.* for costs, and at the same time is entitled to receive 38*l.* 14*s.* from him for other costs, nothing would seem more reasonable than that these sums should be set off one against the other. Several objections, however, have been made to this application: first, that it interferes with the rights of the solicitor; but I have no doubt whatever of the rule, that the lien of the solicitor for costs is not to interfere with the rights of the parties." And as to the other objection respecting the jurisdiction, his Lordship said, "It appears to me, that in making this application the plaintiffs do not seek to vary the

<sup>1</sup> 6 T. R. 456.

<sup>2</sup> 6 Beav. 304.

order made by the Lord Chancellor in their favour, but claiming against the defendant the duty of his obedience to that order. And admitting in favour of the defendant the duty of their own obedience to the order made here, they ask that the defendant may not be at liberty to enforce obedience to the order made here, without, on his part, obeying the Lord Chancellor's order; and they offer to accept what is due *from* them in satisfaction, *pro tanto*, of what is due *to* them. . . . I think that the order must be made to set off the costs due to the defendant under one order, against an equal account of the costs due from the defendant under the other order." In the foregoing case, the costs in question on each side were so nearly equal in amount, that the allowance of the right of set-off was a practical nullification of the solicitor's lien, and consequently the subordination of this lien to the subsisting equities of the parties to the cause cannot be more completely exemplified.

This doctrine, however, is not confined to courts of equity. Accordingly, the court of King's Bench, in *Howell v. Harding*<sup>1</sup>, declared that "the attorney's lien only attaches upon the balance of the costs accruing in the same cause, which are ultimately to be paid over to the one or other party in that cause; and that the cause is not to be split, so as to give the attorney of either party a lien upon interlocutory costs, although ultimately his client should be bound to pay costs to a greater amount to the adverse party; . . . that the attorney was only a representative character, and had a right to represent his client in this respect upon the general and final result of the cause; that his lien was entire, and not one lien upon the costs of the declaration, another upon the costs of the plea, and so forth."

The equities, also, to which the solicitor's lien is thus made to yield, are not confined to the mutual liabilities of the parties in respect of costs alone. Thus in *Bawtree v. Watson*<sup>2</sup>, a sum was reported due as a debt from the plaintiff to the defendant; and, on the other hand, the defendant was ordered to pay the costs of the suit. The solicitor of the de-

<sup>1</sup> 8 East, 362.<sup>2</sup> 2 Keen, 713.

defendant petitioned to be allowed a lien upon the balance of money so found due to his client, without regard to the plaintiff's right of set-off for the costs payable to him by the defendant. Lord Langdale M. R. :—" The principal question is, whether the lien of a solicitor is to enter into conflict with the equities between the parties ; or whether, in a case where costs have been awarded to the plaintiff, and a debt found due from him, he can, on further directions, be permitted to set off the costs, without regard to the lien of the solicitor. . . . I am of opinion that the solicitor's lien, upon a balance due to his client, cannot extend beyond the amount of the true balance ultimately ascertained ; although, in one stage of the cause, a larger balance than that which was ultimately found to be just appeared on the Master's report." The petition was dismissed with costs.<sup>1</sup>

So far, likewise, as regards the solicitor's lien, the equity or right of set-off is not impaired by the circumstance of either party having previously issued personal execution against the other for payment of costs formerly ordered to be paid in the same suit ; and in such cases the solicitor's lien is still restricted to the clear balance ultimately due to his client. This appears by the case of *Bawtree v. Watson*<sup>2</sup>, where the plaintiff's costs of suit were taxed at 324*l.* ; but before the accounts directed by the decree were taken by the Master, the defendant was imprisoned in the King's Bench for debt, at the suit of another person ; and thereupon the plaintiff in this cause lodged an attachment for the costs with the marshal of the prison, and became entitled to detain the defendant for the amount of the taxed costs. In a supplemental suit a balance of 454*l.* was found in favour of the defendant upon the accounts originally directed ; and, under these circumstances, defendant's solicitor contended, that the plaintiff, by lodging the attachment, had elected to adopt his legal remedy for the recovery of his costs, and thereby lost his equitable right of set-off. Lord Langdale M. R. :—" The plaintiff has been declared to be entitled to his costs ; and as against the defendant, or his assignee, or his solicitor, the

<sup>1</sup> See also *Nicholson v. Norton*, 7 Beav. 67.

<sup>2</sup> 2 Keen, 712.

plaintiff has a right in this court to apply any balance due to the defendant towards satisfaction of those costs, if the right be not prejudiced by lodging the attachment, and I do not think that this makes any difference. I am of opinion that the execution of a writ of attachment for costs does not deprive the party issuing it of any lien or right of set-off for 'payment of the same costs which he may possess.'"

It has likewise been established in favour of the solicitor's right of lien, that if, after a prohibitory notice from the plaintiff's attorney, the defendant's attorney pay the debt and damages to the plaintiff himself, such payment is void as against the plaintiff's attorney, and the court will order that his lien be satisfied by the defendant's attorney. This occurred in the case of *Read v. Dupper*.<sup>1</sup> The cause was agreed to be referred to the Master, who awarded a certain sum to be paid to the plaintiff, together with costs. The plaintiff threatened to take the defendant in execution, unless the money were immediately paid: whereupon the defendant's attorney, *after notice to the contrary* from the plaintiff's attorneys, paid the whole sum to the plaintiff himself. The court of King's Bench, at the instance of the plaintiff's attorneys, granted a rule against the defendant's attorney to show cause why it should not be referred to the Master to enquire, what lien the plaintiff's attorneys had upon the debt and costs recovered in the action, as against the plaintiff himself, and why the defendant's attorney should not pay over that sum to the plaintiff's attorneys. All collusion was expressly denied by the defendant's attorney; and the payment was alleged to have been made by him solely to save his client from the threatened execution. But the court made the rule absolute. Lord Kenyon C. J. : — "If the money had been paid over *bonâ fide* to the plaintiff before notice from his attorney of his lien, such payment would have been good; but here the payment was made in violation of the notice, which cannot be suffered. In *Welch v. Hole*<sup>2</sup>, Lord Mansfield compared this to the case of an assignment of a chose in action; which, indeed, in legal strictness, cannot be done; but still, according to the rules of equity and honest dealing, if the

<sup>1</sup> 6 T. R. 361.

<sup>2</sup> Doug 226.

assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice."

In order still further to protect the solicitor in whose favour this right of lien may have accrued, it has been decided that a *voluntary* release or compromise of the matters in dispute between the parties to the suit or action shall not be allowed to oust the solicitor from his privilege. This appears from the case of *Swaine v. Senate*<sup>1</sup>, where the defendant, being arrested for 180*l.*, put in bail, and went abroad. Shortly afterwards the plaintiff proposed to one of the bail to settle the action by taking 40*l.* in money, and his acceptance for 35*l.*, in discharge of the debt and costs. To this the bail agreed; and the defendant's attorney having attended for the purpose of settling the matter upon these terms, the plaintiff, who was at the time a prisoner in the Fleet, gave a receipt for 75*l.* to the bail "in full discharge of the debt and costs in this cause." The plaintiff's attorney, on being informed of this arrangement, nevertheless proceeded to judgment, and issued a *scire facias* against the bail; and thereupon a rule was obtained to show cause why proceedings against the bail should not be set aside with costs. Sir James Mansfield C. J. :—"I do not collect from the cases, that any positive rule has been laid down, which obliges us to hold that the plaintiff's attorney may be cheated of his costs, unless he has given notice to the defendant, or his attorney, not to pay them over. . . . The present is not the case of the defendant himself paying a sum of money to the plaintiff in consequence of an agreement between them, without the intervention of a professional man. Here the bail himself calls upon the defendant's attorney, who goes to the London Coffee-House, within the rules of the Fleet, and there settles with the plaintiff. This was a strong measure for an attorney, who must have known that the plaintiff's attorney had a lien for his costs. The debt was 180*l.*, and it is not suggested that anything less than the whole debt was due. . . . The plaintiff, a prisoner, is content to take 40*l.* in money, and an acceptance for 35*l.* more, and to give up the rest, and his costs. Why

<sup>1</sup> 2 N. R. 99.

should the plaintiff, who was a distressed man, give this up? and how could the defendant's attorney, acting for the bail, possibly authorise such a transaction, without feeling that he was taking out of the hands of the plaintiff's attorney that which, if it had been paid in the regular course, would have enabled the latter to obtain his costs? It appears to me, that one great object of this transaction was to deprive him of his costs; and if the payment was fraudulent and collusive, I think that the plaintiff's attorney ought to be allowed to proceed with the suit for the recovery of his costs." Rooke J. :—" I never thought that where the plaintiff and defendant leagued to cheat the attorney, the court is not authorised to interfere." Chambre J. :—" I think that the fraud is quite apparent upon the face of this transaction. The case is much stronger on account of the interposition of the attorney. No inducement is stated for the plaintiff to accept so much less than his due, unless it were done with a view to cheat the plaintiff's attorney of his costs; in which object the defendant's attorney co-operated. It appears to me, indeed, that the settlement itself is void; for, according to the case of *Fitch v. Sutton*, 5 East, 230., acceptance of a less sum is not a satisfaction in law of a greater sum due."

Again, in *Cole v. Bennett*<sup>1</sup>, where the parties to the action entered into some private arrangement, the effect of which was to defeat the lien of the plaintiff's attorney, the court of Exchequer recognised the rule under consideration. Garrow B. :—" The conduct of both plaintiff and defendant was exceedingly suspicious. They had no right to enter into such settlement behind the attorney's back. Both of them knew that some costs were due to the attorney; and all the cases proceed on the ground, that the parties are not to be permitted, by any such collusion, to cheat the attorney." The same principle was applied in *Bankruptcy* by Sir Thomas Plumer V. C. in *ex parte Bryant*<sup>2</sup>, where an order had been made for the payment of the costs of a petition, his Honour refusing to allow a client's release of the costs to operate in derogation of the lien of his solicitor; " Although the costs," said his Honour, " are not given out of a fund in court, yet

<sup>1</sup> 6 Price, 15.

<sup>2</sup> 2 Rose, 237.

the solicitor's claim attaches upon them, and they are properly payable to him."

In one case the court of King's Bench even held that, notwithstanding the attorney laboured under a statutory disqualification to practise at the time of the action being tried, the client should not be allowed, by receiving the fruits of the judgment, to disappoint the attorney's right of lien on the fund. This occurred in *Dimond v. Clarke*<sup>1</sup>, where the plaintiff had brought an action against the defendants on a policy of insurance against fire, and obtained a verdict for 800*l*. The costs were taxed, as between party and party, at 338*l*.; and the whole amount of the debt and costs was afterwards paid to the plaintiff, and not to his attorney. Mr. Empson, the plaintiff's attorney, having made application to him for payment of the bill of costs, the plaintiff obtained a judge's order for its taxation, having previously given the usual undertaking for payment of the amount found to be due: but it was sworn, that, at the time of such undertaking, the plaintiff was ignorant that Mr. Empson was disqualified from practising, by not having taken out his certificate at the time of the business done. The plaintiff neglected to appear before the Master at the taxation of the bill, and Mr. Empson's unpaid costs were found by the Master's allocatur to amount to 122*l*. A rule nisi for an attachment for non-payment of these costs was obtained by Mr. Empson; and upon showing cause, the plaintiff relied upon the statute 37 Geo. 3. c. 90. s. 31., which enacted that "every person admitted, sworn, and enrolled in any of the courts as therein mentioned, who should neglect to obtain his certificate thereof for the space of one whole year, should from thenceforth be incapable of practising, in his own or any other name, in any of the said courts, by virtue of such admission, entry, and enrolment; and the admission, entry, and enrolment of such person in any of the said courts should be null and void." By the 30th section of the same statute it was enacted, "that if any person should, in his own or any other name, prosecute, carry on, or defend any action, &c., in any of the said courts,

<sup>1</sup> 1 Chitt. Rep. 222.



for gain, fee, or reward, or should do any act in any of the said courts as an attorney or solicitor without obtaining his certificate, or without entering the same, he should forfeit 50*l.*, and be incapable to maintain any *action or suit*, in any court of law or equity, for recovering any fee, reward, or disbursement on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, without such certificate as aforesaid." The court of King's Bench at first seemed inclined to think that the plaintiff, by undertaking to pay what might appear due, had precluded himself from relying on the statute; but afterwards held that the undertaking applied only to the amount *legally* due, and admitted the objection. However, it was considered that as the plaintiff, in the first instance, had received the whole debt and costs, Mr. Empson might recover the costs, without the aid of his character of attorney, by treating the money originally received by the plaintiff for the costs of the action as received, *pro tanto*, to the use of his attorney.

At the same time, the lien of the solicitor will not be suffered to prevail in opposition to that right which litigating parties obviously possess, of terminating their disputes by an amicable arrangement amongst themselves, for fair and valuable consideration. In a case before Lord Hardwicke, his lordship thus adverted to the point under consideration:—"It is objected that the client has released it (the sum recovered) to his adversary, and that binds his solicitor, or clerk in court; who, though they may have originally a lien on what has been recovered by their expense, diligence, and costs, yet that is not to extend to that degree as to prevent the client fairly and honestly from making an end with his adversary. I am of that opinion, *provided any thing appeared to be paid*. If the client had by *composition*, or any reasonable consideration for the costs, made an end with his adversary, I would not suffer this equity to be set up."<sup>1</sup>

The case of *Welsh v. Hole*<sup>2</sup> was entirely in accordance with these observations of Lord Hardwicke. The plaintiff had brought an action for an assault, and recovered 20*l.*

<sup>1</sup> Anon. 2 Ves. Sen. 25.

<sup>2</sup> Doug. 326.

damages. A writ of error was brought by the defendant; and, pending these proceedings, the plaintiff personally compromised the matter with the defendant (who had lain in jail two years) by accepting payment of ten guineas, and executing a release. The plaintiff's attorney thereupon applied for a rule to show cause why the defendant should not pay him his bill of costs. Lord Mansfield C. J. :—" Though there may be some reason to think that there was collusion here to cheat the attorney, yet, on the other hand, ten guineas may be a reasonable compensation from a man who has lain two years in jail. Besides; this application goes to the extent of controverting the validity of a payment of the *whole* debt and costs to the plaintiff without the privity of his attorney: and it would be too much to say that the defendant shall not transact the business of a cause with the plaintiff himself in a case where there has been no notice not to do so from the attorney, either express or implied."

It appears, also, that an attorney has no right of lien on the *body* of a party who is become liable to pay damages or costs. Thus, in *Marr v. Smith*<sup>1</sup>, the plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record; and the court of King's Bench held, that the defendant, *who was in custody*, was entitled to be discharged, although the lien of the plaintiff's attorney had not been satisfied, the attorney having no lien on the defendant's body.

It is to be observed, however, that where an action is brought for *unliquidated* damages, the parties are not precluded from compromising the action, although the attorney may thereby be deprived of his lien for costs upon the amount recoverable. Thus in *Exparte Hart*<sup>2</sup>, it appeared that an action had been brought by Tovery against Palmer, a constable and overseer, for an excessive distress for poor rates; and after notice of trial had been given, Hart, the attorney for the plaintiff, gave notice to the defendant not to settle or compromise the action without his the attorney's

<sup>1</sup> 4 B. & A. 466.; and see *Martin v. Francis*, 2 B. & A. 402.

<sup>2</sup> 1 B. & Ad. 660.

consent. The parties nevertheless proceeded to a compromise; and Hart then obtained a rule calling on the defendant to show cause why he should not pay the plaintiff's costs in the action to Hart, as his attorney. But *per curiam*:—"There was no surprise or misrepresentation in this case; and this case is to be distinguished from those cited<sup>1</sup>, as being an action for damages purely unliquidated. The rule must therefore be discharged."

One peculiarity of the lien on funds is, that it may be *actively* enforced.<sup>2</sup> In this respect it is clearly to be distinguished from a lien on papers; the latter being entirely a *passive* lien, a mere right to retain and utterly unavailing so long as the client chooses to leave the documents in his solicitor's hands, and has no occasion for the use of them. In *Welsh v. Hole*<sup>3</sup> Lord Mansfield said, "An attorney has a lien on the money recovered by his client for his bill of costs. If the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied." We have already seen, also, that where, after notice to the contrary from the attorney, the money has been paid over to the client, such payment is in the party's own wrong, and, on the application of the solicitor, the Court will make an order upon the party for payment of the amount of the solicitor's bill of costs.<sup>4</sup> This right of actively enforcing a lien on funds was also exercised in the case of — *v. Bolton*<sup>5</sup>, where the defendant had sued the plaintiff to judgment at law, and the cause was referred to arbitration to ascertain the damages. After the award, Bolton's attorney claimed a lien on the damages for his costs of the action and other business, and gave the plaintiff notice not to part with the money. The plaintiff thereupon filed a bill of interpleader. It was objected that this was not a case of interpleader; and that the attorney, if he had a lien, should

<sup>1</sup> *Welsh v. Hole*, Doug. 238.; *Read v. Duppar*, 6 T. R. 361.; *Swaine v. Senate*, 2 N. R. 99.; *Chapman v. Haw*, 1 Taunt. 341.

<sup>2</sup> *Per* Ld. Cottenham C., 4 Mylne & Craig, 357, 358.

<sup>3</sup> Doug. 226.

<sup>4</sup> *Read v. Duppar*, 6 T. R. 361.

<sup>5</sup> 18 Ves. 292.

have applied to the court in which the action was brought. Sir W. Grant M. R. said, though the court of law, exercising a summary jurisdiction, might assume the power of giving equitable relief, that would not oust the jurisdiction of the court of Chancery; and his Honour referred it to the Master to ascertain what was due to the attorney.

Again; in *Exparte Bryant*<sup>1</sup>, William List, having been arrested on his return from proving a debt under a Commission of Bankruptcy, obtained an order from the Lord Chancellor for his discharge, at the costs of the attorney who directed the arrest, and of the officer who had executed it. List's solicitor in the matter served this order upon the parties, and demanded payment of his costs, which was refused, on the ground that List had released them for a valuable consideration. List was insolvent, and his solicitor had given notice to the parties to pay the costs to himself, and not to List. Upon their refusal, the solicitor petitioned the Lord Chancellor to order payment; and Lord Eldon being of opinion that the solicitor's lien had attached upon these costs, and that List could not release them to the prejudice of his solicitor, made the order as prayed.

It has been decided, however, that an attorney's lien for his costs in an action does not authorise interference with the personal liberty of the opposite party, so as to attach upon the defendant's body. Where, therefore, a plaintiff, after he had recovered judgment, made terms with the defendant (who had been charged in execution), and employed a new attorney to enter satisfaction on the record, the defendant was held entitled to be discharged out of custody, although the lien of the plaintiff's attorney for his costs had not been satisfied.<sup>2</sup>

The foregoing pages having referred to cases in which the fund recovered was the property of the client, it will not be unimportant here to observe, that a trustee, notwithstanding his right to deduct all his expenses out of the trust fund, does not communicate to his solicitor any lien thereon for his bill

<sup>1</sup> 2 Rose, 237.; and see *Lloyd v. Mason*, 4 Hare, 132.

<sup>2</sup> *Marr v. Smith*, 4 B. & A. 466.; *Pyne v. Erle*, 8 T. R. 407.

of costs; and in *Worrall v. Harford*<sup>1</sup>, an attempt by a solicitor to establish and enforce such a lien entirely failed. In that case, a trader having become embarrassed in his circumstances, made an arrangement with his creditors, and vested his property in trustees, upon trust to sell and to pay thereout, in the first instance, all the costs and expenses connected with the execution of the trust. The trustees employed the plaintiff as their solicitor; and considerable costs having been incurred by him in relation to the trust, he filed a bill, seeking to be declared a creditor under the trust-deed, and to be paid the amount of his costs out of the fund. A demurrer was put in on the part of the trustees, and Lord Eldon allowed it; holding, that though the solicitor of the trustees had the same right against them personally as he had against any other client, yet that he had no claim against the trust-fund. In *Hall v. Laver*<sup>2</sup>, Vice-Chancellor Wigram has also lately expressed a similar opinion.

There appears to be no doubt that a solicitor, conducting a cause on the part of an infant, has the same lien upon the money recovered in the suit by his means and at his expense, as he had in the case of an adult<sup>3</sup>; and therefore, if the suit is successful, the prochein amy is in general secure from being put to any charges on the infant's behalf.

It remains to observe, that the solicitor's lien on the fund may be forfeited, destroyed, and waived. If the solicitor should refuse to proceed with a cause which he has undertaken to conduct, this desertion of his client creates a forfeiture and destruction of the lien; so that, until the termination of a cause, or until a judgment or decree ascertaining the right to the fund has been obtained, the solicitor's lien is merely inchoate or presumptive, and may be devested by his breach or neglect of duty.

Lord Chancellor Eldon<sup>4</sup>, in a very early part of his judicial career in Chancery, stated, that if a solicitor undertakes to bring an action, or do any business, *that* part of the undertaking is, that he shall faithfully and honestly bring that

<sup>1</sup> 8 Ves. 4.

<sup>2</sup> *Staines v. Maddox*, Mos. 319.

<sup>3</sup> 1 Hare, 571.

<sup>4</sup> 6 Ves. 4.

business to a conclusion: and if he fail in that, he cannot bring an action for anything. Of this doctrine, so far as it operates to deprive the solicitor of his lien on the fund, the subsequent case of *Creswell v. Byron*<sup>1</sup> is an example. There the solicitor acted for the plaintiff in the cause from some time in the year 1789 until July 1792; when, on the plaintiff refusing to follow the advice of the solicitor and the counsel, the solicitor declined to be concerned any further for the client. By the decree it was directed that all costs should be taxed, and that, after certain deductions, a moiety of the fund in court should be paid to the plaintiff. The solicitor, having under this decree obtained the taxation of his costs, presented a petition, praying that his bill of costs might be paid out of the fund. He stated that the plaintiff, his client, was in indigent circumstances, and totally dependent upon the fund in question; and that the solicitor's entire demand would be lost, unless the court directed it to be paid out of the fund in court. Lord Eldon:—"I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien if he does not carry the business through to a hearing. If that could take place, there might be numerous claims of lien. The court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill."

As it would be inconsistent to extend the doctrine of lien to a case where the solicitor obviously does not intend to rely upon the right for his protection, the rule has also been established, that where the solicitor, either before the suit or pending its progress, takes a special security for his costs, his lien on the fund is superseded. An instance of this occurred in the case of *Cowell v. Simpson*<sup>2</sup>, where the solicitors had taken from their client two notes payable with interest, three years after date, for the amount of their bill of costs; and it was decided that the special contract was a waiver of the general right of lien. The following passage occurs in Lord Eldon's judgment:—"Suppose a sum of money declared to be due by decree or judgment: it is clear, according to the,

<sup>1</sup> 14 Ves. 271.

<sup>2</sup> 16 Ves. 275.

established rule of lien, and the practice, that the attorney may give notice to the defendant not to pay the money until his costs are satisfied. How can that lien be consistent with a special agreement to give credit for three years, receiving interest? He must either abandon that contract; or claim under it, and his lien also; insisting that, notwithstanding that contract, he will not permit the client to receive the money for three years. The proposition, that the lien can exist after such a special contract, necessarily involves a contradiction to that contract. My opinion is, that where these special agreements are taken, the lien does not remain; and whether the securities are due, or not, makes no difference."

But a solicitor will not be deprived of his lien on a fund in court for his costs in the cause by having issued an attachment against his client, and committed him to gaol for non-payment of his bill, though the costs which he may receive in the cause must in such a case be taken in discharge of the attachment *pro tanto*. This was decided by the court of Exchequer in *Davies v. Bush*<sup>1</sup>; and in the recent case of *Lloyd v. Mason*<sup>2</sup>, before V. C. Wigram, where the same point arose, His Honour said:—"Unless the lien of a solicitor stands on a different footing from other securities, I do not understand why an attempt to obtain payment of his demand by proceeding against the person of his debtor—a proceeding which the debtor may have rendered abortive by refusing to pay the demand—should, *per se*, be held a waiver of the lien. A mortgagee, whether legal or equitable, does not waive his security by bringing an action against his debtor. Nor, so far as I am aware, does a vendor lose his lien for his purchase-money by a like proceeding." In the same case the further question arose, whether, by the stat. 1 & 2 Vict. c. 110., a solicitor, who has issued execution against the person of his client, is thereby deprived of his lien on the fund? By the 16th section of that act, a judgment creditor who, before the property charged with his debt shall have been converted into money, causes the person of the judgment debtor to be taken in execution upon such judg-

<sup>1</sup> *Davies v. Bush*, 1 You. 358.

<sup>2</sup> 4 Hare, 132.

ment, is deemed to have relinquished all right to the benefit of his charge or security; and, by the 18th section of the same act, the decrees and orders of Courts of Equity in respect of costs operate as judgments. It was therefore contended that the solicitor who had obtained an order at the Rolls for payment of his costs had, by executing an attachment against his client, lost the benefit of his lien. V.C. Wigram:—"The effect of the statute (s. 16.), as I understand it, is only to deprive the creditor of all the benefit which the statute gives him; the consequence of which is, that he is remitted to, or rather left in, possession of the rights he had independently of the Act. . . . I was, however, referred to the effect of a judgment at law, to which, it was said, the order of this court is now, by s. 18. of the Act, made equivalent. . . . A mortgagee, who recovers judgment on his bond or covenant, cannot, so long as the judgment remains in force, sue his debtor upon the same bond or covenant: but he does not thereby lose his collateral security. . . . If the argument be well founded, that the execution against the person of the debtor is for all purposes a complete satisfaction of the creditor's demand, it might be difficult to stop short of the conclusion, that a mortgagor, against whose person execution had issued for the mortgage debt, might, when in prison, redeem the mortgage, although the debt was unpaid."

The death of the client before the fruits of the judgment are reduced into possession, will not defeat the solicitor's lien on the fund. It was attempted, without success, to establish the contrary proposition in *Lloyd v. Mason*<sup>1</sup>; but, notwithstanding the decease of the client, the lien was sustained by the court. V.C. Wigram:—"It was said, that in consequence of the death of Thomas Lloyd, the solicitor must go in as a creditor against his estate, and could not recover his debt in a summary way, without regard to the claims of other creditors of Thomas Lloyd. . . . That argument, if admitted, would go to this, that a solicitor in all cases loses his lien upon a fund, although recovered by his diligence, if his client should happen to die before his costs are paid. Such, I apprehend, is not the course of courts of justice in such cases;

<sup>1</sup> 4 Hare, 132.



nor is there any reason in principle for it. The lien of the solicitor, like a charge in favour of any other person, gives the solicitor an interest in the fund itself; and the proper party to protect the fund against any excess of claim in both cases is the executor. A creditor, having a security for his debt, may, if he pleases, file a creditor's bill against the executor of the debtor; but he may, if he pleases, confine his suit to realising his own security. The only difference between that case and the present is, that in this case the solicitor has a summary remedy; but that does not alter the principle."

Neither will the lien of the solicitor on the fund be postponed to the claims of his client's specialty creditors. This was decided in the case of *Turwin v. Gibson*<sup>1</sup>, where the plaintiff in the original cause having died, his personal representative insisted that the solicitor had no right to be paid out of the sum decreed for the plaintiff in preference to his bond-creditors. Lord Chancellor Hardwicke:—"I am of opinion that a solicitor, in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of the duty decreed for the plaintiff, and a lien upon it, before the bond-creditors of the deceased plaintiff; and it is constantly the rule of this court; neither can the administratrix controvert this rule, by insisting upon applying the assets in a course of administration."

Neither will the bankruptcy of the client affect the lien of his solicitor upon the fruits of a judgment previously recovered. This point arose in *Griffin v. Eyles*<sup>2</sup>, which was an action against the warden of the Fleet for the escape of one Jaques, a prisoner in execution at the plaintiff's suit. The plaintiff having recovered judgment against the defendant for 252*l.*, sued out a *fi. fa.*, directed to the sheriff of Surrey, who made a levy to that amount on the defendant's goods. Soon after, the defendant gave notice to the sheriff to retain the money levied, stating that he should make an application to the court to set aside the proceedings for irregularity. On the receipt of this notice, the sheriff refused to pay the money

<sup>1</sup> 3 Atk. 720.

<sup>2</sup> 1 H. Black. 122.

to the plaintiff's attorney: in consequence of which the attorney obtained a rule to show cause why the sheriff should not pay the money, with interest, from the time of the levy, on an affidavit which stated that the whole sum was due to him for his bill of costs as attorney for the plaintiff; viz. part for the debt for which Jaques was taken in execution (which was the amount of costs taxed in an action brought by Jaques against the present plaintiff in the Exchequer), and the remainder for the costs of the present action for the escape. On the part of the sheriff it was urged, that, after the judgment, the plaintiff had become bankrupt. But the court of Common Pleas, on the authority of *Turwin v. Gibson*<sup>1</sup> and *Welch v. Hole*<sup>2</sup>, made the rule absolute.

We may here notice an observation of Lord Hardwicke in *Barnesley v. Powell*<sup>3</sup>, that "if a solicitor prosecutes to a decree, he has a lien on the estate recovered, in the hands of the person recovering, for his bills; but if the client should die, the solicitor has no such lien on the estate in the hands of the heir-at-law, unless it should be necessary to have the suit revived, and then the lien will revive too." It is presumed that his Lordship referred to the death of the client *before* a decree for costs was pronounced. Otherwise, we apprehend, that on the principles already discussed in this article, the heir succeeding to an estate affected by the lien would take the inheritance *cum onere*.<sup>4</sup>

*(To be continued.)*

<sup>1</sup> 3 Atk. 720.

<sup>2</sup> Ambler, 102.

<sup>3</sup> Doug. 226.

<sup>4</sup> Lloyd v. Mason, 4 Hare, 132.

## ART. VII.—LORD PRESIDENT BLAIR.

Few members of the legal profession in either country have left behind them a higher or a purer fame than the distinguished personage of whom we are now to speak. To talents of an exalted order as a lawyer and a judge, he added the gift of a masculine understanding, powerful over whatever subject its strength might be exercised; and though deficient in the portion of an advocate's qualifications which connects itself with the mere acting graces of manner, and even the more ordinary and easily acquired gifts of eloquence, he yet showed his great powers even as an advocate, surpassed though these were by the extent of his learning and the weight of his opinion. His success too, was commensurate with these endowments and acquirements; his station might always have been far higher had he chosen to sacrifice his ease, or been actuated by a more vulgar and bustling ambition; and he nevertheless closed his life in the first legal station on the Bench, after having for several years been placed by the unanimous choice of his brethren at the head of the Bar. To record the history of such a man is performing the duty of a work like ours.

Robert Blair was the third son of the Reverend R. Blair, well known as the author of a very popular poem, "The Grave;" a clergyman of learning as well as genius, and son of David Blair, King William's chaplain at the Hague, while yet stadtholder only, afterwards one of the ministers of Edinburgh, grandson of Robert Blair, chaplain of Charles I. a distinguished leader of the Covenanters, in which capacity the ghostly warrior bore the standard of the Scottish host at the famous battle of Marston Moor, where he joined his brethren in employing "the king's authority against his person." This remarkable individual had been some time settled at Bangor in Ireland, where he was the founder of the Ulster Synod. In Baillie's letters frequent mention is made of him, and from his high attainments, polite accom-

plishments, and dignified deportment, he was deemed a fit person to superintend the education of the royal children, in case the extremity of the struggle had been delayed, or it had ended in a compromise. It is not improper to note these particulars, because they enable us to trace through a succession of forefathers, not every capacity, but the peculiar species of capacity by which the subject of this memoir was distinguished: for it is easy to perceive the lineaments of the same masculine and lofty character both in the chaplain of William, evidently settled in Holland in order to escape the compliances required by the Charleses and the Jameses; and in the covenanting chief, who could both fill the pulpit and wield the sword in defence of his cherished principles.

The poet was settled at Athelstonford, in East Lothian, by a singular coincidence the same cure which was afterwards held by John Home, author of *Douglas*. He married Isabella Law, of Elvanston, one of the celebrated family of Law of Lawriston. The great lawyer had thus an hereditary title to the decision of character and firmness of purpose which ever marked him, whether we regard his paternal or his maternal descent.

He was born in 1742. His father died three years after his birth; and he was at first placed in the grammar school of Haddington with the celebrated Henry Dundas, first Lord Melville, an accident which laid the foundation of an intimate friendship that continued with unabated affection through both their lives, both ending within a few days of each other; for Lord Melville died the night before his ancient comrade's remains were consigned to the grave. From Haddington he was removed to the High School at Edinburgh, and became Dux, or head by merit, of the Rector's class, at the time of his leaving that celebrated seminary.

That he pursued his studies, both at school and college, with assiduity and with success, we have irrefragable proof in those tastes for classical learning which ever remained with him, and those habits of learned reading which he intermingled with his professional studies, though somewhat less continually indulged than his inclination would naturally have prompted, in consequence of an indolent turn of mind and body which led him, when the fatigues of the day were

past, to indulge a good deal in what the Italians term the *dolce far niente*, elevated in their sultry and exhausting climate to the dignity of a saint.\* But the style of his speeches often betokened that his eloquence was drawn from pure sources, and formed upon antique models.

He was admitted an advocate in 1764, and obtained a considerable share of practice from the first. When Mr. Dundas was made Lord Advocate, he was with Messrs. Craig and Abercromby, afterwards judges, appointed one of his deputies, termed Depute Advocates, important officers, especially in the absence of their chief on his parliamentary duties, as on them are devolved the duties of the great and most beneficial office of Public Prosecutor; the institution for which we of England have daily occasion to envy our Scottish neighbours. Indeed, when we say most beneficial, we use a feeble expression. The necessity of this office is quite apparent to all who bestow a thought on the most important branch of our jurisprudence, the administration of criminal justice. Any thing more barbarous than the state of the English procedure in this respect cannot well be figured. We have already more than once had occasion to call the attention of our readers to it, that so great a defect may at length be supplied, and the duty of enforcing the law may no longer be left to mere haphazard, but confided to fit and to responsible hands; a change all the more necessary now that we have allowed every prisoner to be defended by the skill and the eloquence and the learning of counsel.

The successor to Lord Melville as Solicitor General, when he was made Lord Advocate, was as a matter of course to be looked for in the sacred family — that of Dundas, — not Mr. Blair, though an experienced advocate and eminent lawyer — not Mr. Blair, though the Lord Advocate Dundas's most ancient and chosen friend, was ever thought of for his successor; but a young gentleman of fair talents, excellent character, and pleasing manners, was pitched upon, in the person of Mr. Robert Dundas, Lord Melville's son-in-law by marriage, and nephew by birth, and he at the early age of four-and-twenty was first made Solicitor General, and afterwards,

\* *Sacro-santo far niente.*

at the somewhat more mature age of twenty-seven, Lord Advocate, public prosecutor, and minister for Scotland. Thus, however, were things in those days managed among our northern neighbours, who, inured to the family propensities so cherished by the feudal system, never marvelled at any advantage conferred by relationship to a great man, nor concerned themselves in solving the indeterminate problem of comparing merit with birth, which they were taught to regard as incommensurate quantities, and no more dreamt of comparing them together, than of subtracting pounds sterling from pounds avoirdupois.

In 1789, Mr. Blair, not at the Dundas — solicitor age of twenty-four, or even at the Dundas — advocate age of twenty-seven, but at the more mature age of forty-seven, was at length made Solicitor General, and was then in the height of favour both with the country and the courts. His practice was extensive; his learning varied, accurate, and profound; his judgment sound as well as penetrating; so that his opinion had weight, not only with the profession, but with the judges, who seemed, when they felt reluctantly compelled to decide against him, to feel afraid, and almost to apologise for the liberty they took. His official rank of course increased his already ample share of business, and his retiring nature leading him to feel abundantly contented with the eminence which he had attained, he more than once refused to be made a judge. This occurred in 1795, when pressed to it by the government, especially by the Chancellor, Lord Loughborough, on which occasion the Secretary of State communicated in very flattering terms the King's regret, but also His Majesty's full sense of the motives which had governed the refusal, "and which had rather raised than lowered him in the King's opinion." The same occurrence was repeated in 1801, when the office of Justice Clerk, Chief Criminal Judge, was vacant by Lord Braxfield's decease. This, the second station in the profession, and leading surely to the first, was refused by the high-minded individual whose history we are recording, and on a ground as rare as it is noble. He felt apprehensive, though not above threescore years of age, that he might not have strength of body to sit out, in the requisite vigour of mind, a long criminal trial. "Therefore," said he,

"I cannot think of accepting an office of such importance, with the prospect before my eyes of being obliged, in any important occurrence, to allow the duty to be discharged by others. You may be assured," he adds, "it is not a pleasant reflection for me to think that I am thus excluded from any promotion in the line of my profession, to which I might otherwise have been thought entitled. But I have seriously considered the matter over and over again, and my mind has long been made up to it. The only situation I can look to when I quit my present office, is that of an ordinary Judge of the Court of Session, and that I shall accept when you desire me to do it."— This letter was addressed to Lord Melville, and we may add, that an ordinary Judge of the Court of Session has no criminal business to transact. Another illustrious lawyer, Mr. Cranstoun, afterwards Lord Corehouse, always declined taking the promotion and emoluments of a Criminal Judge, upon somewhat of the same high sense of honour and feeling of public duty. We rather hope than believe that the bar of either country can afford other instances of public virtue to place by the side of those two great men—the lights of the Scottish bar, and the just objects of universal veneration.\*

In 1802, when Mr. Dundas became Chief Baron, he was succeeded as Lord Advocate by Mr. Charles Hope, Mr. Blair declining to fill an office which would have entailed upon him the necessity of parliamentary attendance, to which his own modesty, far rather than any real deficiency, pronounced him inadequate. In like manner he allowed Sir James Montgomery to go over his head when Mr. Hope succeeded Lord Eskgrove as Justice Clerk in the winter of 1805.

Mr. Blair thus continued from 1789 to 1806 in the office of Solicitor General. On Mr. Pitt's death at the beginning of the latter year, the Grenville administration was formed, and Mr. John Clerk was appointed Solicitor General, Mr. Henry Erskine in like manner superseding Sir James Montgomery as Lord Advocate. Upon the dissolution of the

\* When Lord Corehouse had been maltreated by the former government, a discussion (1840) arose in the House of Lords redounding to the high honour, and even glory, of this distinguished person.

Grenville ministry in 1807, the division of the Court of Session into two branches being resolved upon, and the new bill being to take effect in 1808, it was known that Sir Ilay Campbell intended to resign upon that event, and therefore Mr. Blair did not resume his office of Solicitor General. He was in 1808 raised to the high office of Lord President, which he filled till his lamented death in June, 1811. We have noticed the melancholy coincidence of that event with the decease of his oldest and most intimate friend, Lord Melville. In fact, the suddenness of the President's death gave a shock to his friend, which, operating on an organic complaint of the heart, proved fatal. He went to bed on Friday the 11th of June, intending to attend the President's funeral the day after, but he was found dead in his bed on that morning. The President himself had been in perfect health till the preceding Sunday, when he had felt somewhat indisposed, but so slightly that he walked out as usual before dinner. In returning home his gait was observed to be less firm than usual. He reached his house, however, when he fell into the servant's arms, and in a quarter of an hour expired. Lord Melville's complaint, apparently of the same class, had for eight or nine years been known to exist, and with his wonted firmness of mind, he had drawn up an account of the symptoms, exceedingly detailed and accurate, and almost learned, which he was accustomed to show any medical man that might beset him with inquiries, directed, as the veteran politician and experienced Scotchman was prone to suspect, partly to improving the inquirer's knowledge of the disease, partly to improving his acquaintance with the minister.

The President's funeral was attended by all the judges, by the heads of the bar, by the professors of the University, and by a deputation of the General Assembly, then in session. The ceremonial is said to have been solemn and imposing, as far at least as the funerals of our northern neighbours can reach that pitch; for, instead of our noble and affecting service, it is well known that they only stand, covered and silent, by the grave, till the earth is put on the coffin, and then, taking off their hats as a last token of respect, disperse.

Mr. Blair was married to Miss Isabella Hackett, youngest daughter of Colonel Hackett Cragie of Lawhill, representa-



tive of one of the ancient families in Fifeshire. By her he had one son, now member of the Supreme Court of Corft, and three daughters, the eldest of whom is married to Mr. Macnochie, of whose father we spoke in our last number, and who, after filling the offices of Solicitor General and Lord Advocate, was afterwards a judge by the title of Lord Meadowbank.

The preceding account of the President's rare disinterestedness in respect of professional advancement, will have prepared the reader for the statement that he left an exceedingly limited fortune to his family. It will also prepare him to approve entirely of the just distribution of royal favour by which Mr. Perceval conferred on the widow and daughters an adequate pension, Lord Meadowbank, however, refusing, though not then in office, any portion of that liberality to his wife. There is great satisfaction in dwelling upon such traits both in the President, his son-in-law, and the government, all having well performed their parts upon the melancholy occasion. We may add that no man could be more spotless in his whole private as well as public character. In every relation of life he was blameless and sincere; for, beside being a most kind member of his own family, his generosity to his friends, when required for their relief, was far from being always limited by a prudent regard to his own means. He more than once made himself liable for their losses, and relieved them from embarrassment by incurring their responsibilities.

In approaching the task of estimating his merits, while at the Bar or on the Bench, we must remark that the indolence already referred to was far indeed from being the listless idleness of empty and frivolous minds, whose inaction leaves little to regret, inasmuch as their negligence would be as fruitful of good, (possibly more fruitful,) as their impotent acting or their *prava diligentia*. Blair's was rather the *vis inertiae* of great faculties than the aversion of little men to labour. He had been a steady and a diligent student; the whole principles of our jurisprudence were known to him with familiarity, and applied by him with an ease that proved this familiar acquaintance; nor did he ever, on any occasion, show the least disposition to withdraw from work when the interests of his client or his public duty required it. Nay, it is very

possible, that when ordinary observers thought they perceived him sitting inactive and unoccupied, his mind was like that of Mr. Fox, who loved the like relaxation, both from work and from talk, could but the lovers of talk leave him to his enjoyment, and who certainly was not lost in a wool-gathering reverie all the while, but generally occupying his great faculties with the exercise he most loved — the pursuing trains of reasoning, and forging, as it were, chains of argumentation without any definite object on which to use them — a peculiarity which made Lord Brougham apply to him the lines in Homer upon the labours of Vulcan's forge.\* As an instance at once of Blair's industry as well as of his conscientious nature, the fact may be mentioned, that, upon being raised to the bench, he actually read through, with care and diligence, the whole of Erskine's and of Stair's Institutes. We recollect Sir V. Gibbs being very much edified when calling on Sir James Mansfield, and finding him in bed, to see that he was reading Coke Littleton.

The genius of Blair was eminently fitted for legal pursuits. Of a bold and masculine understanding, a penetrating sagacity, and profound reflection, without the subtlety of Matthew Ross,—with little of the penetrating acuteness almost preternatural, of William Tait, who was occasionally the dupe of his own quickness,—with little fancy in inventing topics, and no great nimbleness in meeting or escaping objections,—he yet always brought to bear upon his subject a plain and homely vigour, to which almost all difficulties yielded, and before which almost all antagonists gave way. His style, too, both of reasoning and of diction, bore the impress of his nature; they were plainly suited to the man; they were racy and they were apposite. The hearer never for a moment doubted that the speaker thoroughly understood the whole matter in hand, and was perfect master of it. Despising the vulgar arts of ordinary advocates, he unfolded the subject to all exactly as he saw it

\* 'Εν δ' ἔθετ' ἀκμόβητον μέγαν ἄκμονα, κόπτε δὲ δεσμούς  
 Ἀρρήκτους, ἄλύτους, ὅφρ' ἔμπεδον αὖθι μένοιεν.

*Od. θ.*

On its huge base the massive anvil placed,  
 He forged the firmly knit, unbroken chain,  
 Which fix'd as rock for ever must remain.

himself; and his comments had so much force, were so plain, yet so strong, and clothed with so much dignity of expression as well as presented with so much gravity and yet earnestness of manner, that his discourse seemed rather judicial than forensic, and he appeared to decide the cause he was pleading. So earnest a manner is generally an abatement of dignity; yet in this speaker it proved not so; his vehemence, even though sustained by little fluency, and set off by less felicity of diction, never for an instant led the hearers or the spectators to undervalue him, and withhold respect, as is wont to happen when, in the fervour of declamation, the orator, seeming to lose the command of himself, is nearly sure to lose the sway over his audience. We have spoken of his fluency as considerable; but this had no bad effect; for, as you saw a mind struggling with the topic, you perceived that the ideas were too many to find easy utterance; there was none of the unpleasant anxiety attending a hesitating speaker, and which is displeasing because it gives alarm. The thoughts were there, and struggling for birth, and, in one way or another, were sure to reach the audience. Occasionally he rose to a higher pitch than merely the height of argumentation — if indeed, any higher pitch there be. No one who had the advantage of hearing his noble speech in the case of Heriot, the descendant of the founder of the hospital, will easily forget the fine burst of impassioned and indignant eloquence with which he denounced the cruel injustice of disputing the founder's wish for his kindred. "What avails it, my lords, that a great benefactor of his species should generously devote the hard earnings of a long life to the sacred uses of charity, if no sooner he is laid in the grave than all he most fondly favoured are repudiated, all his cherished objects cast into oblivion, all his darling plans scorned?" &c. From what has been said of his manner of reasoning, it must not be supposed that the contrast with Matthew Ross and William Tait implies any admission of his having been either at all wanting in the quickness wherewith the latter was so singularly gifted, or in the capacity for handling the greatest subtleties of the law which so eminently distinguished the former of those great masters of legal dialectics. The reference was rather made to the manner than to the matter of their disputation —

for there was no man of more clear and swift apprehension in dealing with a case, how obscure and complicated soever. This he owed to his extraordinary power of fixing his attention undivided on his subject. Nor was there any subtlety of the law, however refined and remote from ordinary apprehension, which he was not at all times prepared to embrace and to pursue. To say this of him is only saying what no one could doubt, that he had an eminently legal and logical understanding.

In one particular it might be, perhaps, expected that a person who, albeit of high poetical descent, had never cultivated the powers of imagination, should yet be no mean master of sarcasm, and even of ordinary ridicule. It is true he rarely indulged in this; and chiefly brought its force to bear upon the absurdity of an adverse position. But a most accurate observer, and who had long and closely watched him (Baron Hume), has said that he "was noted for a command of sarcastic wit and raillery, though he never left the case to seek for opportunities of indulging in this vein, his wit being ever to the point, and, as it were, wit and argument in one." The same excellent judge has also said, in praise as well of his honesty as his good sense and severe taste, that he "was remarkable for never stooping to make use of a frivolous or futile argument."

At the advanced age of sixty-six he ascended the bench, and then was seen in all its great glory the first quality of his nature, an innate love of justice and abhorrence of iniquity; "without which," a celebrated writer, Professor Playfair, tells us, "the President was accustomed emphatically to declare all other qualities in a judge avail nothing, or rather are worse than nothing." This shone conspicuously through his whole life, but more especially when he sat on the bench. He had, indeed, intuitively (as Baron Hume has observed), "a generous contempt of any thing low or disingenuous." His patience was equally eminent; and as the same high authority has well said, extended "both to parties and their advocates; while his endowments were graced by an earnest and vivid elocution, and by a natural dignity of manner, and an animated majesty of countenance, which struck the evil-

doer with awe, and gave assurance of the native worth and energy of the spirit that reigned within."

The same high authority has told us that he had a most admirable quality for a judge, proceeding from the manly and honest nature of his understanding. He took liberal and enlarged views of law, but abstained, as he disdained it, from hunting after novelties, and making discoveries in the law he was bound to administer. He was thus wholly free from the great vice of clever and ingenious men, what in Westminster Hall is termed a love of crotchets, a most fruitful parent of error and misdecision, and which thus makes judges unjust. In like manner was he slow to interrupt or anticipate counsel, a habit proceeding from petty conceit, and greatly to be repressed on the Bench. "Quantum (says Lord Bacon, discoursing of this love of crotchets) ad advocatos qui causas agunt, patientia et gravitas in causis audiendis, justitiæ est pars essentialis; et judex nimis interloquens minime est cymbalum bene sonans. Non laudi est judici si primus aliquid in causâ inveniat et arripiat quod ab advocatis, suo tempore, melius audiri potuisset; aut acumen ostendet in probationibus vel advocatorum perorationibus nimis cito interrumpendis; aut anticipet informationes quæstionibus, licet ad rem pertinentibus." (*Fideles Sermones*, Art. 54., *De Officio Judicis*.) We have already noticed his exemplary patience; and his reproofs, being most rarely administered, produced extraordinary effect. But it was in nowise for the sake of this effect that he proved so sparing of them; his mingled sense of justice and feeling of humanity induced him to keep in mind the same wise man's maxim: "Etiam reprehensiones de loco superiore graves esse debent non contumeliosæ." (*Ib.* Art. 11., *De Magistratibus*.)

It is said that he was somewhat dilatory in the execution of the judicial office, and that an arrear was springing up in his court. But the advanced age at which he came to the chair may be one cause of this, and the novelty of the system he was called to administer, after the division of the Court, was another. Take him for all in all, it may be safely affirmed that he presented one of the most perfect examples of forensic and judicial capacity combined in the same person, which the annals of either bar affords. Therefore, before all

judges in all countries he is to be held constantly up to admiration and to imitation, and his memory by all lawyers must be borne in lasting remembrance.

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#### ART. VIII. — THE RAILWAY BOARD.

WE entered in our last number into this subject with the fulness which its great importance appeared to require, and we so amply discussed the principles which ought to guide private or personal legislation, as well as the incurable defects of the plan adopted by the Government for assisting the two Houses in the consideration of railway bills, that little remains now to be added beyond calling the reader's attention to the results of the system unfortunately adopted. The progress of the session has, indeed, woefully justified all our assertions, and must have woefully disappointed the able and worthy persons who had conceived hopes of the scheme working well. A more complete failure is not upon record.

It will be recollected that the professed design of the Board was to assist Parliament, and this desirable object was to be attained by instituting a previous inquiry into each case, and reporting to the two Houses whether one scheme or the other should be adopted, when there was a competition, and when only one was proposed, by deciding for or against that one. It is true no evidence was to be examined by the Board; they were merely to hear the statements of the parties. Nor were the contending parties to hear each other's objections, or remove or try to remove them; but, proceeding in the dark, the Board was to form an opinion in each case, and report it for the assistance of the Legislature. Any thing so manifestly absurd as this project of helping the clear-seeing by the guidance of the blind,—of assisting those who must see the whole with the opinion of those who could only see a part,—of saving the time of the body which was obliged to examine fully by reporting the opinion of the body which had hardly examined at all,—was certainly never before thought

of by any political projector; it was an institution wholly original, one which had escaped the ingenious imaginations of all constitution-mongers from Solon down to Sieyes, and which, as it followed no former example, was likely to be followed by no imitators.

This unhappy plan, however, found much favour with some of the Government. The unerring sagacity of the Great Duke, indeed, seemed to value it at its real worth; he never could be got to utter one word in its behalf when most sorely pressed by its admirers. The practical good sense of Sir Robert Peel kept him equally aloof. But among the less discreet or less clear-sighted, panegyrists were found; and it was averred with much complacency that the Reports of the Board could not fail to receive countenance and to be adopted by Parliament, not from the authority of the Government, but because of their own intrinsic merit and the ability of their authors, with a strange forgetfulness of the plain fact, that a board of five angels could not possibly make any reports of the least value were they to be so composed as this Board was, and so restricted to groping in the dark. Nevertheless, the effect of these panegyrics, the assumed weight of the Government, the probability that its influence would be employed, the certainty that any "*department*" (awful word on the Exchange!) had reported on any subject, was quite sure to affect the share market, and accordingly the Reports could not fail to produce a great effect there, whatever they might do in Parliament. Lord Stanley's ingenuous avowal that the Reports would be certainly followed in ninety-nine cases out of a hundred, for their intrinsic value, deceived many as to their probable influence, though it deceived none as to the grounds of that influence. Most men thought that those Reports would succeed with committees, though no one was silly enough to fancy that they deserved, or could deserve, success. Besides, no one expected till Parliament met that the Commons would adopt the new Orders for Private Bills, adopted by the Lords ever since 1837, and strenuously rejected by the Commons from the influence of jobbing over the members of that House,—and until these Orders were adopted, the influence of Government and of the Railway Board in every com-

mittee was sure to be very great, however little its decisions deserved to be respected, or were worthy of attention. Hence the first Reports were of tremendous effect in the City,—no sooner was a scheme known to be rejected than its stock fell to nothing; no sooner was a plan approved of than its scrip rose to a premium. The brother of one of the Board was proved to have purchased above two hundred shares of a railway which happened, a few days after the purchase, to be reported as fit and proper by the Board. This, no doubt, gave the utmost value and importance to all the transactions of all the Board's connections. Men carefully watched their doings, their goings out and comings in, and gambled accordingly. Another case was much commented upon—the stock of one of two railways rose suddenly in the market, and next day or the day after there came out a Report in favour of that line. “Oh,” it was then said, “nothing was more easily explained! There had been a junction formed between two contending parties, and those were thus sure to defeat the third, whose stock fell as theirs rose, because the coalition was likely to gain the Board's approval.” It has since been proved to demonstration that the persons who said this were grossly deceived; that there had been an offer of one to the other, which was rejected; that this other was too confident of the Board's support to entertain the proposal; that accordingly the Board did approve; and that to this hour the supposed union never has been effected,—so that the statement was not only groundless, but was the very reverse of true, and the very circumstances which were relied on to explain the rise, most strongly confirmed all the suspicions to which that rise had given occasion. In truth, no man can doubt that in some way or other the intention of the Board had transpired, and influenced the market. To say that the rise took place before the Board's resolution had been formed is utterly childish, and betokens either extreme bad faith or singular ignorance of the manner in which decisions are ever come to. Who can doubt—who can for one moment doubt, that long before the votes of a board are actually taken, the opinions of a majority are constantly formed, and those who concur with them are well aware of the inevitable result? It is quite needless to multiply examples.



We may, however, add, that a celebrated engineer openly declared at one time,—he has been silent since,—that the Railway Board gentlemen were very clumsy if they did not gain thirty or forty thousand pounds in the course of the session. We are far from supposing any such thing; but it is quite enough that a department should exist in which it depends upon men's sense of honour whether they shall become suddenly rich or continue poor. Their connexions have assuredly been benefited. One was suddenly put over every one's head and made managing director of a line as soon as his brother was made of the Board; and it so happened that the Board's Report was in favour of that same line. The obscure learned kinsmen of others held numerous briefs in committees of the House of Commons on railways, all of which had been approved by the Board, some of whom had never practised in our Courts at all,—nor, it is said, were heard to earn their fees by their voice in these cases, how valuable soever they may have been in council. All these things show the general impression to prevail, that jobbing was not impossible in this department. Who ever heard of a Cabinet minister's relation being employed in business, and merely because of his relationship?

We can have no doubt, then, that in working mischief among capitalists, and in drawing discredit upon the Government, the Board has been very far from inoperative; but in bringing aid to the Houses of Parliament its operation has been exactly what might have been expected; it has been wholly impotent to that purpose. The only doubt which remained in the minds of those who before considered the subject, was, whether or not the committees of the Houses would pay regard to the Reports of the Board. If they paid none, the Board was wholly inoperative; if they did, the grossest injustice was done, because cases were decided, or at least their decision was influenced, by a body wholly or almost wholly ignorant of their merits. While the public remained in this state of doubt, it was possible that some effect might arise from the Reports, because it was possible that the projectors, defeated before the Board, might so far feel the influence of the Reports as to abandon their schemes. A very few days, however, only elapsed before it appeared that the

Reports went for exactly nothing before the committees. When referred to by the parties in whose favour the Board had determined, the committees frequently stopped the counsel, and said they regarded these Reports as waste paper. So much for the valuable help received by Parliament from the labours of the Board! Then the adoption of the new Orders of 1837, borrowed from the Lords and now first received by the Commons, was speedily found to exert a salutary influence on the deliberations of committees. The five members carefully selected to form each committee, acting under an undivided responsibility and in public, acting too without any change in their numbers, and acting regularly like a court of law, gave much more attention both to the subjects brought before them, and had much more regard for their own character than the old committees, who were bound by no rules, and proceeded by job and canvas. The bills brought before them by those in whose favour the Board had decided, were scrutinised exactly as if there never had been a Board at all. The bills thrown out by the Board were brought forward as if no Report had been made against them. The whole were dealt with as if no Reports whatever had been made; in a great number of instances the favourite bills of the Board were rejected, and the rejected bills were passed: all men of all parties now saw plainly that the Board had ceased to rule, and might just as well cease to exist, for it had been reduced to a nullity whether for good or for evil.

We record these things, not in order to indulge any exultation at our opinion having received so remarkable a confirmation from the event, or to claim our share in the praise of having brought about the utter discredit into which the scheme has notoriously fallen; but to remind the reader of the dangers which must ever attend a departure from sound and just principles in the administration of public affairs, and the inestimable benefits resulting from the free discussion of Government measures, and absolute publicity in the proceedings of the Legislature. No man can tell what mischiefs might have flowed from the plan, had the same secrecy shrouded the operations of the Parliament which screened those of the Board from the eye of the public. Nor can any one say how long this absurd and ill-contrived

scheme might have infected the administration of public affairs, and how far its principles might have been extended into other departments, if the free discussion to which it was happily subjected, both in Parliament and the country, had not worked its downfall.

Since these pages were written—while they were passing through the press, the downfall of the famous Board is announced. Both Sir Robert Peel (who, to do him justice, never said one word in its favour at any time), and Lord Dalhousie (who has acted, it must be owned, with great fairness and acuteness throughout), have announced what is gently termed its New Modelling—which is much the kind of modelling of the body politic that the body natural undergoes when decently interred. The Board is no longer to report any opinion at all, but only to keep watch on the part of the public, and to see that no railway scheme is brought forward which interferes with any right of the Crown or the public—that is to say, giving warning when any such encroachment appears to be probable. Of course, beyond merely giving a warning it can have no power. The Houses of Parliament must then deal with the whole matter; and the misfortune is exactly this,—that the gross errors and habitual getting into the wrong of the Board, whenever it was possible, have stamped its proceedings with so low a character, that its warnings will bear a less value than they possibly may deserve to have, and the Parliament and the country, accustomed to despise these Reports, will, not unnaturally, continue to treat them with indifference.<sup>1</sup>

<sup>1</sup> We may here notice that the frauds so disgraceful to the promoters of some railways, lately exposed, show how much reason we had for our remarks on private legislation. The evidence that has been recently produced as to this will demand our attention in an early Number.

ART. IX. PRACTICAL SUGGESTIONS TO PROMOTERS  
OF RAILWAYS.

*Report from the Select Committee of the House of Lords appointed to take into consideration the Practicability and the Expediency of establishing some Principle of Compensation to be made to the Owners of Real Property whose Lands, &c. may be compulsorily taken for the Construction of Public Railways; and also further to take into consideration the Question of Severance and that of Injury to Residences; and to report thereon to the House; together with the Minutes of Evidence taken before the said Committee. Session 1845.*

WE propose here to give a short practical summary of the duties of solicitors and others employed to carry Railway Bills through Parliament; an entirely new department of professional business, which has become so important, and yet is so little understood, that a few pages may, we think, be reasonably devoted to it.

Without further preface, then, and without any apology for the poverty of our materials, let us observe, that after the railway company has been formed, the first duty of their solicitor is (in conjunction with the engineer) to put himself in communication with the principal landowners on the proposed line. We say the *principal* landowners; because it will not often be possible for him to confer with them all. His object will be to ascertain how the line can best be laid out so as to suit their convenience, and even to meet their wishes, and gratify their feelings, consistently with a due regard to the public accommodation. Infinite benefit will result in all cases from a due attention to this preliminary formula, while, on the other hand, a neglect of it may have the effect of exposing the promoters to an expensive opposition in both Houses of Parliament; and this not upon substantial grounds of injury, or real difference of opinion, but from mere pique and resentment operating on the minds of powerful proprietors, whose hostility might easily have been disarmed by the

manifestation beforehand of a proper disposition to consult their inclinations. The discretion of the solicitor, therefore, and, we may add, of the engineer, on these occasions, will entitle them to the gratitude of the promoters, who in general are not ambitious of a too copious evacuation of their capital in the costly arena of a parliamentary committee. Several instances, occurring in the present session, might be cited to show the expediency of the conciliatory, we had almost said propitiatory, course which we now recommend. In one case an eminent engineer, by persisting in carrying an obnoxious line through the estate and close to the residence of an aged and much venerated peer in the north of England, provoked the son of that nobleman to set up a plan for a rival railway, which, for a time, placed the original scheme in jeopardy. In another case the landowners, roused by the blind obstinacy of a dogged and perverse engineer, came to Parliament in a body, and compelled the promoters to make such important deviations in nearly the whole length of the line as proved practically an abandonment of their scheme for the present year. Enough, therefore, on this head.

The line being definitively adjusted, the next step is to prepare notices of the intention to apply to Parliament; and these must be inserted in the Gazette and country newspapers for three successive weeks in the months of October or November immediately anterior to the session in which application for the bill is to be made.<sup>1</sup> Of the notices, the formal parts will be best attended to by the parliamentary agents for the bill. It is the solicitor's province to see that the parishes, &c. are accurately inserted; in which respect any omission or mistake may prove of serious consequence. The termini should be stated with as much precision as the plans will allow; for any material elongation or curtailment of the line after publication of the notices will not be permitted. And, in general, it may be said to be a rule to incorporate in the notice all such particulars of the objects and intentions of the company as it may behove the public to be made acquainted with.

<sup>1</sup> Commons' Standing Orders, No. 15.

Concurrently with the preparation of these notices, what are called the books of reference should be proceeded with; and these require the greatest care and circumspection on the part of the solicitor—no part of his duty being more onerous, or more troublesome and irksome in its performance. For not only is the operation in itself very difficult, but, in general, the labour is rendered still more oppressive by the dilatory supineness of engineers and surveyors, who almost invariably put off, till the last moment, the delivery of their plans; and thus sufficient opportunity is not allowed the solicitor for obtaining the requisite information; it being indispensable that every separate property, however small or insignificant, be duly numbered and “referenced” in the manner pointed out by the standing orders. The slightest omission or inaccuracy may produce great inconvenience—for Parliament will not grant compulsory powers to the company to purchase any property not specified in the reference book; and this will make it necessary to apply to the Legislature again, in another session, for the requisite authority—a contingency which even the greatest vigilance may, and often does, fail to avert. Hence the staple objection before standing-order committees is omissions and defects in the reference books.

The proper deposits being made, a written application must next be sent to the owners, lessees, and occupiers named in the reference book, requesting of them to state, in writing, their assent, dissent, or neutrality, as regards the proposed line; so that the same may be reported to Parliament. If no opposition is announced, the solicitor’s task will be comparatively easy; but where the answers returned intimate *dissent*, the highest exercise of discretion will be necessary, in order, if possible, to effect amicable arrangements, so as to prevent actual opposition in committee. In general, we believe it is prudent to make large concessions to parties seeking compensation. The most experienced solicitors act on this principle. To be satisfied of the prudence of such a course, one has only to reflect on the enormous expense of which a protracted contest is invariably the parent in a parliamentary tribunal. To avert, or even to mitigate, this evil, considerable sacrifices may wisely be made. For not only

are expense and delay produced by opposition, but even the merits of the line and its expediency, in a public point of view, are apt to be underrated or lost sight of when it appears that a great many local or individual interests are likely to be injured by it. It ought, therefore, to be the study and constant endeavour of the solicitor for the bill, up to the latest moment, to extinguish or weaken opposition by offering equitable and liberal terms wherever there is even a chance of any reasonable accommodation being effected. What are called, in the new nomenclature of Parliament, residuary interests, ought particularly to be dealt with on the fairest and largest principles of concession; not only because cases founded on claims of that description are in themselves entitled to extraordinary favour, but because in both Houses, but especially in the Lords, there is now the strongest disposition to protect them.

At the same time we may remark, that the only good purpose to be attained by making bargains with landowners before obtaining the act is, to prevent them from opposing the bill in its progress through Parliament. Where there is no appearance or probability of actual opposition, all such dealings should be deferred until the act has been obtained. And even where landowners, or others, state objections to the proposed line, the practical question for the consideration of the solicitor, after all, is *this* — Are the complainants likely to petition, or will they be satisfied with mere grumbling? In the latter case, it is quite unnecessary to treat with them until the bill has been passed.

Much light is thrown on the arcana of railway practice by the Report of a Select Committee of the House of Lords, which we have placed at the head of this article. One of the witnesses examined, Mr. John Clutton, the solicitor of the South Eastern Railway Company, carries the matter somewhat farther than we are disposed to agree with him; for he states, undisguisedly, that —

“ It is only parties who have some influence in opposing railway companies that are settled with before the passing of the bill.

“ Some means of giving you trouble in the committee?

“ Yes. With small proprietors, and I would class with them all the middle

men, the costs of a petition to parliament are so heavy that they are all afraid of it.

"What do you mean by the middle men?"

"I mean the proprietors of small estates; men having a hundred or two or three hundred acres.

"Do you attach the same degree of importance now, as in the earlier years of railways, to the number of assentient or dissentient proprietors given in?"

"I do not attach any importance to them, unless they have either influence or money to oppose the railway. Assent or dissent does not appear to me at all important under ordinary circumstances."<sup>1</sup>

Another witness, Mr. John Duncan, the solicitor of the Eastern Counties Railway, being asked by what rule he governs himself in dealing with a dissentient landowner before going into committee, observes, —

"I should say it depends upon the weight of the landowner's opposition and influence. If we have any fear that he is likely to defeat the bill, I think we then look at that as a special case for a settlement; and in settling we are not very nice about the price that we pay; and also where we feel that we can save expense by stopping opposition, we likewise settle on that ground frequently. It is the same thing to us whether we spend the money in the one shape or another.

"How do you estimate the probability of a party being able to defeat the bill in parliament?"

"I can hardly say how we estimate it, but in each case we know pretty well what extent of difficulty a man can occasion to us by fighting day after day in a committee. There is always the view adopted by the promoters of a bill, that where there is a judgment going to take place upon conflicting evidence, the bill may be defeated; and that is sufficient to induce us to try to get rid of opposition.

"It is better for you to pay a little more to some landowners than to pay counsel day after day in the committee?"

"There is no doubt we often look at the matter in that light.

"Have you often a bargain with the landowners before you come before the committee?"

"In some cases. It is not nearly so much done as it was in 1836. In 1836, and partially in 1837, it was done much more than it now is.

"Have you given larger sums to persons who were considered to have influence in the Houses of Parliament than to others?"

"I should not wish to say in the Houses of Parliament; I should not like to individualise at all. I merely state, that in order to get rid of opposition to bills we have sometimes given large sums."<sup>2</sup>

The next thing (we are not now speaking in the precise order of time), will be the preparation of what are called traffic tables, to show, in the first place, the insufficiency for agricultural, commercial, manufacturing, or other purposes,

<sup>1</sup> Minutes of Evidence, p. 18.

<sup>2</sup> Minutes of Evidence, p. 13.



of the present means of conveyance and of communication between the proposed termini. These tables ought to set forth the present amount of traffic by land and water, the average charges made for passengers and goods, and the time occupied. They ought also to show the number of passengers, and the weight and description of the goods, expected on the proposed railway, as well as the amount of income looked for from the conveyance of passengers and goods; stating, likewise, the description of articles from which the largest or most considerable revenue may be anticipated. It is evident that on the accuracy of these tables all must depend; and therefore no pains can be regarded as thrown away, which are calculated to render them correct and unimpeachable.

As the sentiments and opinions of the district through which the railway is to pass are a material element for the consideration of Parliament, petitions, expressive of those sentiments and opinions, should be procured from the different towns and more considerable villages on the line, as well as from influential individual residents, setting forth the advantages which may be expected to arise from the proposed undertaking. These petitions, however, ought not to be framed by the solicitor for the bill. They ought not to be sent by him for signature. There ought to be no unseemly "getting up" of the petitions, but all should emanate spontaneously from the parties interested; the duty of the solicitor, however, not debarring him from using proper methods to awaken their attention to the benefits which the measure, if carried, is likely to confer.

Petitions, when carefully prepared and respectably signed, have great weight in committee. Their authority is of course increased whenever they happen to be backed by the resolutions of public meetings called by advertisement, and assembled to discuss freely the merits of the question. On the other hand, nothing can be more awkward than that it should come out, on cross-examination, that scores of petitions, and all of them couched in nearly the same terms, have been drawn up in the solicitor's office, and distributed by agents despatched to the different localities to canvass for subscriptions. Such disclosures are by no means of rare occurrence; and

they invariably cast a shade of discredit and suspicion on the case so sought to be established.<sup>1</sup>

The selection of proper witnesses to prove the preamble of the bill,—that is to say, the expediency of the measure,—is next to be considered. The points to be proved are,—1st, The inconvenience felt from the want of a railway;—2d, The benefits which a railway would confer. These two points will be established by persons who can state facts and arguments derived from their practical observation and experience. They ought to be able to make an exposition of their views to the committee; for the mode of examining witnesses and the mode of giving evidence before a railway committee, especially in the House of Commons, is widely different from that pursued upon a trial at law.

Proof of the inconveniences felt from the want of a railway, and the advantages which a railway would confer being secured, it will be no less necessary to see that the engineers of the line are properly prepared to attend and give evidence of its practicability. It will also be expedient to have contractors in attendance, to prove that the expense of the proposed works is reasonably estimated; for the expense of executing and maintaining these works is one of the chief elements of consideration, in judging how far a railway is likely to succeed or prove a failure.

Previously to the presentation of the petition, one-twentieth part of the amount subscribed must be paid into the Bank of England, in the name of the Accountant General of the Court of Chancery; the estimate, lists of owners, leasees, and occupiers, and copies of the subscription contract must be deposited in the parliamentary offices; a print of the proposed bill must be annexed to the petition, which must be signed by the parties, or some of them, who are suitors for the bill, usually four or five of the provisional directors. The petition is re-

<sup>1</sup> In the Commons, it is the practice to refer to the committee the petitions against a bill only, and not those in its favour, which are ordered to lie on the table. The difficulty of bringing directly before the committee the feeling of the locality, as testified by petitions, may be obviated by having them analysed before presentment, and the number and respectability of parties signing them proved by some of the witnesses from the neighbourhood.

ferred to the Select Committee on Petitions, and by them to a sub-committee, before whom the case may be brought at the expiration of ten clear days from the presentation of the petition. If the sub-committee report that the standing orders have been complied with, leave will be given to bring in the bill. If, however, they report any instances of non-compliance, however trifling, their report is referred to the Select Committee on Standing Orders, whose duty it is to report to the House whether the non-compliances are of such moment as to induce a recommendation that the standing orders should not be dispensed with. The parties are not heard before this committee, but must be in attendance at the meeting of the committee, and, when the case is called, each hands in a written statement. The decision of this committee is not final if against the bill, as the House have in one or two instances given leave to the parties to proceed, notwithstanding an unfavourable report.

After the introduction of the bill, its further progress is almost entirely under the direction of the parliamentary agent; the duty of the solicitor resolving itself into getting up the case on the merits, making arrangements with landowners, &c.

Passing over the proceedings in both Houses (as not within the scope of this article), we shall now assume that the railway bill has at last become law; and that the company are about to carry their work into execution. In that case it will not only be necessary to keep in view the provisions of their own special act, but also to pay regard to the requirements of three general uniformity statutes, passed in the present session; to each of which respectively we must now crave attention.

These statutes were passed on the 8th of May last. The first of them, the 8 Vic. c. 16., is intitled the *Company's Clauses Consolidation Act*. It is of a more general character than the other two, applying as it does to *every* joint-stock company which shall by any act be incorporated for the purpose of carrying on *any undertaking* of whatever nature or description. In preparing an incorporation bill, therefore, the future draftsman has only to look to this statute, which furnishes him with a code of regulations, at once minute and comprehensive, the dictates of experience, which he will in vain hope

to emulate by any original combinations of his own understanding.

The second of these enactments, the 8 Vic. c. 18, is the *Land Clauses Consolidation Act*, whereby certain customary provisions introduced in statutes, authorising the compulsory taking of lands for public purposes, are consolidated.

The third and most important of these uniformity statutes is the 8 Vic. c. 20., intitled, *The Railway Consolidation Act*; which, besides many other wise regulations, limits the extent of permissible deviations from the mysterious datum line, of which so much has been said, without commensurate edification, in the present session of parliament. This datum line is a horizontal line, taken from a point near either of the termini. It must be the same throughout the whole length of the main railway and its branches respectively; the object being to show the gradients and changes of level of the proposed works: and this is done by vertical measures, taken from the datum or horizontal line to the railway line, marking, by feet and inches, each change of gradient or inclination that may occur, in other words, noting the extent of vertical deviation made by the railway line from the datum or fixed line. But perhaps the most useful clause in this act<sup>1</sup> is that which *compels* the arrangement of disputes between railway companies and landowners by means of arbitration; it being so provided, that each party may appoint an arbitrator, who will have power to decide, unless, within the time limited, the other party appoint an arbitrator to act along with the one appointed by his opponent. We rather think this is the first instance in which the adjustment of disputes by arbitration has been made *compulsory*.

Armed then with their act, and governed by these general uniformity statutes, the company have to deal with the owners of land upon the line. They must purchase it all; and they must pay for it liberally. For we believe it is their best policy and truest economy to offer handsome remunerating prices to all with whom they deal. This is the only way in which the enormous expense of arbitrations and jury trials can be avoided. Before the Lords' Select Committee, witnesses,

<sup>1</sup> With some unaccountable variation of expression, the arbitration clause is to be found in the other two uniformity statutes above adverted to.

not numerous indeed, but of great practical experience in the dealings which take place between railway companies and landed proprietors, were examined, and the substance of their evidence is thus summed up in the Report:—

“With respect to the land, &c. actually taken, the witnesses who were examined state, that to the marketable value of the property taken, they add, in their valuations, a per-centage on the ground of the sale being compulsory. The amount of this per-centage varies with the views of the different witnesses; but the committee are of opinion that a very high per-centage, amounting to not less than fifty per cent. upon the original value, ought to be given in compensation for the compulsion only, to which the seller is bound to submit; the severance and the damage being distinct considerations.

“The committee are of opinion that many cases occur in which it is necessary to consider the land, &c., not merely as a source of income, but as the subject of expensive embellishment, and subservient to the enjoyment and recreation of the proprietor.

“Public advantage may require all these private considerations to be sacrificed; but as it is the only ground upon which a man can justly be deprived of his property and enjoyments, so, in the case of railways, though the public may be considered ultimately the gainers, the immediate motive to their construction is the interest of the speculators, who have no right to complain of being obliged to purchase, at a somewhat high rate, the means of carrying on their speculation.

“It is also to be observed, that the price of the land purchased, and the compensation for that which is injured, form together but a small proportion of the sum required for the construction of a railway, so that no apprehension need be entertained of discouraging their formation by calling upon the speculators to pay largely for the rights which they acquire over the property of others.”<sup>1</sup>

It may be useful to select some of the more remarkable portions of the evidence which, we doubt not, induced the committee to make these observations. We find that Mr. Duncan, being asked whether, in giving compensation, a railway company will take into account the injury done to beauty and to picturesque effect in scenery, over and above the actual pecuniary value of the land compulsorily taken for the purposes of the work, answers,—

“I rather think the company would consider that the public utility must prevail, and that they should pay nothing for any loss of beauty. If the course of the line would touch the owner's pocket injuriously, we should have to pay for that; but I think that for the mere destruction of an object of beauty or interest we should not have to pay any thing. If a party went before a jury, and there was any claim set up of that kind, we should fight it very resolutely.”<sup>2</sup>

Now in a country where the seduction of a man's wife is

<sup>1</sup> Report, p. 4.

<sup>2</sup> Minutes of Evidence, p. 12.

considered a fit subject for compensation in round cash, why should not damages be awarded for the destruction of a fine ruin — say Bolton Abbey, or Fotheringay, — whose value is wholly dependent on association? Why should not something be allowed for the *pretium affectionis*? We entirely disagree with Mr. Duncan's reasoning in this part of his evidence; and we are still less disposed to concur with him on another point, as to which he stands alone.

This question is put to him:—

"Suppose a house cost 10,000*l.*, it would not let for above 200*l.* a year in the country?

"Very likely not.

"Therefore thirty years' purchase upon such a rent as that would be a very inadequate sum to pay?

"There is no doubt that if a railway company takes a house that has cost 10,000*l.*, they do not pay 10,000*l.* for it; they only pay what could be got for it, what it would sell for, together with the additional compensation for taking it compulsorily.

"But supposing you turn the proprietor out of his house?

"Parliament does it.

"Ought you not to pay him for it?

"We do compensate him, to the full extent of its value, and a good deal more. If he wants to preserve his house, and to prevent its being taken for a public work, he must go to parliament, and beg their protection for his house. Parliament gives the company leave to go through it, on paying what it is worth.

"Then his only way of protecting himself is to get the bill thrown out?

"To get the bill thrown out, or to make the company deviate."<sup>1</sup>

The same question as to the 10,000*l.* house is put to Mr. John Clutton, the solicitor of the South-Eastern Railway Company, and we are happy to find that, on being asked whether he would give the amount of money actually expended, that gentleman answers,—

"Yes, and something more.

"You would not take the house and give the owner thirty years' purchase upon 200*l.*, which might be the rent he might get for it, but you would take into consideration the amount of money which he had just laid out upon it?

"I think you must as nearly as possible place the man in the same position as he was in before the railway came. I think no railway company should inflict a hardship upon a private individual if they can ascertain the facts.

"Would you not also allow something for the annoyance of being removed?

"Yes; if he had the year before expended 10,000*l.* for his own comfort, and

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<sup>1</sup> Minutes of Evidence, p. 11.

the company come and take that property away, I should say he should have something beyond the 10,000*l.* for his removal.”<sup>1</sup>

Mr. Edward Driver, the well-known surveyor, is also for dealing liberally in such a case. He says, —

“ I should pay the full cost of the building.

“ And the value of the land it stood upon ?

“ Yes ; and compensation for any inconvenience sustained besides, or disappointment.”<sup>2</sup>

It seems to be a rule as to which, in practice, there is little difference of opinion — that no landowner has a right to compensation unless he have property *on the line*. However destructive it may be to the comfort and happiness of an individual to have a railway pass rather close to him, yet, if it does not go over land that belongs to him, he has no sort of claim. Hear again the inflexible Mr. Duncan : —

“ I know that a case has occurred under our railway acts of parliament where damage was done to an adjoining owner ; but he was not actually on the line, he was not in the book of reference ; we had nothing to pay him for going over his land ; we simply passed by him ; and in making a bridge approach, the road in front of his house was much raised, and we put him to positive inconvenience. He used to go from his garden to the road upon a level, but after this alteration he had to come out of his garden gate, and walk up three or four steps to reach the road. He was not an owner upon the line, and he contended unsuccessfully before arbitrators that the company were bound to pay him compensation. But I know that since that case the courts of law have construed the railway acts so that any person placed in a similar position is entitled to compensation, and that he can go to a jury to settle what the compensation to be paid him should be. But if a gentleman's house is merely injured by the noise, or in respect of the sight of the railway, in matters of that kind I doubt very much indeed whether the act of parliament would give compensation to such a party ; you must have something more close in point of injury than that as a groundwork for compensation. In the case I have mentioned, the raised road was quite close to the person's dwelling, and was an evident and palpable mischief to him ; but in the case of the sight of the railway, or the noise of the railway trains or engine, or matters of that kind, those injuries are too far off from compensation for the acts of parliament to reach them ; at least I apprehend so. I apprehend that, unless the owner of a house situated in the position of being annoyed by sight or noise was an owner upon the line, he would not be able to recover compensation.

“ You have as good a right to erect an embankment opposite a person's house, upon land which belongs to you, as any other owner would have to erect a house there ?

“ Yes, for the public object sanctioned by act of parliament.”<sup>3</sup>

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<sup>1</sup> Minutes of Evidence, p. 23.

<sup>2</sup> Id. p. 28.

<sup>3</sup> Id. p. 9.

Mr. Driver, too, is perhaps still more positive.

"Do you know any case where a person's residence has been injured, and the owner of that residence, not having any property actually on the line, has been compensated for the injury to his residence?"

"None; that principle has never been admitted at all."<sup>1</sup>

To the same effect, Mr. Clutton says, that if the demand of compensation by parties having no property on the line were once recognised,—

"It would be impossible for any company to construct their works, so wide a field would be opened. If you opened that case at all, you might have to compensate every man within ten miles of the line."<sup>2</sup>

Our limits, we regret to find, do not admit of our carrying this matter further. We had intended to say something of the general incompetency of juries to do justice in questions of compensation. We must reserve this, however, for another opportunity; as it seems not improbable that railways and their managers will continue long to furnish matter for occasional lucubrations.

#### ART. X.—ON THE TRIAL BY JURY.

THE trial by jury may be considered, 1st, as regards its origin and history; 2dly, its present practical state and use; 3dly, its capabilities. It cannot be doubted that, however valuable this institution may be, for legal purposes as an instrument for the investigation of truth, and for political purposes as a bulwark of civil liberty, it is not at present enjoyed without some attendant inconveniences, of such a nature as to warrant earnest endeavour to ascertain whether the system may not be rendered more perfect, whether its defects may not be remedied without the sacrifice of any of its advantages.

In purposing, on this occasion, to advert to the history of this mode of trial, we scarcely need to premise, that it would far exceed our present limits to undertake any specific and

<sup>1</sup> Minutes of Evidence, p. 34.

<sup>2</sup> Id. p. 18.



systematic detail of the changes which it has undergone. Our statements and observations must at present be confined, principally, to a selection of such references and authorities as prove and illustrate transitions of a marked specific character. In order to point out these the more clearly, it will be necessary, in the first place, briefly to consider in what the functions of a jury, as now constituted, consist; and also to distinguish the principal forms of which a popular mode of trial is susceptible. A jury, then, as now constituted, may be defined to consist of "twelve men *selected* from the body of the community, and *sworn* to decide any disputed matter of fact by *judging* upon evidence lawfully submitted to them."

It will easily be seen, from this description of the present trial by jury, of what various forms the trial by a merely popular tribunal is capable. Such a one, in its most primitive and simple state, may consist simply of a class or body of persons, indefinite in point of number, and not sworn, and who are to decide, either upon their own personal knowledge or upon evidence laid before them, as in the case of a trial by a body of *suitors*, *pares curiæ*, or *resiants* within any local district.

Again, such a generality may be limited as to number; a further qualification may be added, that the persons so limited in point of number, and selected for the office, shall act under the obligation of an oath. In such case, that is, where the trial is had before a definite number selected for the purpose, and also sworn, they may be termed generally a jury, or if selected by reason of locality, a *jurata patriæ*. The jury, then, or *jurata patriæ*, may be distinguished as regards the functions, which it is appointed to discharge, as a jury of mere *conusance* or *recognition*, for the finding of facts on the mere personal knowledge of the jurors; as a jury of mixed functions acting partly on their own knowledge and partly on evidence laid before them; and lastly, as a jury, such as has already been described, judging merely on evidence of the facts laid before them.

These four distinctions have been made, not because they embrace all possible forms of which a popular tribunal is capable, but because they correspond with those actually exhibited at different periods of our legal history, and also

because they are necessary, in order the more easily to point out the changes which have occurred in that history, and corresponding with it in order of time.

It is here to be observed, that there is another very important function, in respect of which tribunals which exercise a judgment upon facts may be distinguished from each other: such a tribunal may either be limited to the deciding upon mere matter of fact, or may be further entrusted also to decide upon the law as applied to such facts. In order, however, to confine the subject of present consideration within clear and distinct limits, we have endeavoured to avoid any discussion arising out of this latter distinction.

The principle of decision by classes indefinite in point of number, and unsworn, pervaded the legal constitutions of our Saxon ancestors. Suits before the king, between his tenants *in capite*, as well as other suits of great importance, were decided by the *pares* of his Court. Those in the County Court or Hundred Court were tried by the suitors, or *sectatores*, of the Court; whilst in the Courts of inferior jurisdiction belonging to various manors and other franchises, questions were also decided before the *pares* or suitors of the particular court or franchise.

The wisdom and policy manifested by the Anglo-Saxons in framing laws for the manifestation of right, was not less admirable than the order and symmetry observable in the construction of their courts of justice. They aimed at, and to a great extent established, a testimonial system, founded on just and simple principles, and of great practical utility. Many matters of importance of a public nature, and capable of notoriety by public attestation, were transacted openly in the face of the *comitatus*. Grants, agreements, and fines or concords of disputes, were commonly made and transacted in the County Courts, in the presence of the whole *comitatus*, attested often besides by many particular witnesses. Wills also were frequently recorded there.<sup>1</sup> Consequently, when questions arose concerning such transactions, the whole *comitatus* was appealed to in case the transaction had taken place *coram comitatu*; and the proof was by witnesses in the case of a charter or other writing, or a matter transacted

<sup>1</sup> Reg. de Ely, f. 4. Dugdale's Orig. Jur. 30.

before appointed witnesses. With respect to matters of a more private nature, and of minor importance, many wholesome ordinances were made—that they should be transacted in fairs, markets, and other public places, before bailiffs and others who, in case of need, might be vouched to prove the fact.

Two very interesting memorials have descended to us, illustrative of the course of decision in the ancient Saxon County Courts. Although these occurred in the reign of William the Conqueror, it cannot be doubted that they were conducted in conformity with the practice anterior to the Conquest.<sup>1</sup> It may be proper to remind the reader, that the general appellation of County Courts included two descriptions of courts, one of which, the ordinary County Court, or, as it has been termed, the King's County Court, was held before the sheriff, or the King's steward; there was in that court no presiding justiciary, but the suitors, or pares, were themselves the judges of law as well as fact. This court was not a court of record, and was held on *plaint* only, without the King's writ. The other description of County Court was held under the King's writ, directed to his justiciary appointed for the occasion. These distinctions remain to the present day: the proceedings in the ordinary County Court are still technically described as conducted before the suitors, and causes are yet triable by writ of *justicies* in the County Court to any amount. The proceedings in the cases alluded to were by the King's writ directed to his justiciary. In the first of the suits alluded to, Lanfranc, Archbishop of Canterbury, complained against Odo, Bishop of Baieux, the King's brother, for having seized on church lands and usurped many privileges appurtenant to the see in the county of Kent. The King commanded, that the whole county should meet without delay, "*et homines comitatus omnes, Francigenas et præcipue Anglos in antiquis legibus et consuetudinibus peritos, in unum convenire.*" They all met at Pinenden, and sate together without distinction: "*pariter consederunt, quoniam multa placita de dirationibus terrarum et multa de consuetudine legum inter Archi-*

<sup>1</sup> With one exception, which will presently be noticed.

episcopum et prædictum Bajocensem Episcopum ibi surrexerunt, et etiam inter consuetudines regales et archiepiscopales quæ primâ die expediri non potuerunt, eâ causâ totus comitatus per tres dies fuit ibi detentus." The memorial goes on to state, that in those three days the Archbishop so disproved the title of the Bishop to the lands which he and his men held, that on that day when the plea was terminated there remained not a man in the whole kingdom of England who could claim any part of the lands mentioned; nor any thing upon them, "neque super ipsas terras etiam parvum quicquam clamaret." The memorial goes on to state, "et ab omnibus illis probis et sapientibus hominibus qui affuerunt, fuit ita ibi dirationatum et etiam a *toto comitatu recordatum et judicatum*, quod sicut Rex tenet suas terras liberas et quietas in suo dominico, ita Archiepiscopus Cantuariensis tenet suas terras omnino liberas et quietas in suo dominico." It further appears, that Goisfridus Episcopus Constanciensis (qui in loco regis fuit et justiciam illam tenuit) acted as justiciary, with the assistance of some others, of whom Agelric, Bishop of Cicestre, is particularly described, as "vir antiquissimus, et legum terræ sapientissimus, qui, ex precepto Regis, advectus fuit ad ipsas antiquas leges et consuetudines *discutiendas et edocendas* in unâ Quadrigâ."<sup>1</sup>

In the other case adverted to, the contest was between Gundulph, Bishop of Rochester, and Pichot the sheriff, (*Viccomes*) concerning land in Kent, the question being, whether it was the land of the King or of St. Andrew.<sup>2</sup> The King commanded, that all the men of that county, that is, the *sectatores*, should be convened, in order to decide which had the better title.<sup>3</sup> But they, being intimidated by the sheriff, affirmed it to be the land of the King, rather than of St. Andrew. But the Bishop of Baieux (the King's justiciary on that occasion), not trusting to their decision, commanded that, if they knew what they said to be true, they should select twelve of their number, who should confirm what all had said by their oath; but they (the twelve),

<sup>1</sup> Dugdale's Or. Jur. 30. gives this account at length, as from an ancient MS. in Bib. Cotton. sub effigie Vespasiani, A. 22. fol. 120. a.

<sup>2</sup> That is, of the see of Rochester.

<sup>3</sup> This agrees with the form of the issue in a writ of right. — See below.

after they had retired to consult (*ad concilium*), and had been alarmed by a message from the sheriff, on returning, swore that what they had already said was true. And so the land remained in the King's hands. But in the same year, a monk of the name of *Grim* (*quasi à Domino missus*)<sup>1</sup>, came to the Bishop, and having heard what they had sworn, with wonder and detestation, asserted that they were all of them perjured. For the monk (*Grim*) himself had been the overlooker (*prepositus*) of the Lord of Fracheham, and had taken services and customs for that manor, and had had one of those who had so sworn under him in the same manor. This was communicated by the Bishop of Rochester to the Bishop of Baieux, to whom *Grim* gave the same account. The Bishop (the justiciary) then caused one of those who had so sworn to come before him, who, when he had come, falling at the Bishop's feet, confessed his guilt. Another, who had sworn the first, made the like confession. The rest of the jurors were then, by the order of the Bishop (the justiciary), sent to London. All being assembled at London, it was adjudged both by French and English that all the twelve were perjured. On this condemnation the Bishop of Rochester had his land again.<sup>2</sup> It appears, also, from this document, that twelve others *de melioribus comitatus* were called to account for having confirmed what the others had sworn, "qui quod illi juraverant verum esse confirmaverant," and that when these would affirm that they had not agreed with those who had so sworn, the Bishop said they should prove their assertion by the ordeal of iron (*judicio ferri*): this they promised to do, but being unable to perform their promise, were, by the judgment of the county (*judicantibus aliis sui comitatus hominibus*), fined in the penalty of 300 pounds to the King.

Although the course pursued in the case of the Bishop of Rochester was probably more analogous to the Norman<sup>3</sup>

<sup>1</sup> Qu. — whether the pretext of the monk or suggestion of the Registrar?

<sup>2</sup> Regist. Roffense, by Thorpe, p. 31.

<sup>3</sup> The *Monumenta Danica*, lib. 1. p. 72., makes mention of a practice of a similar description. Suits were determined at general meetings of the *parœciæ* or *curiæ*, into which the country was divided. The decision was in the first instance by the *Conventus universus*, as it was here by the *totus Comitatus*; but if the losing party chose, he might appeal from the decision to a select body of twelve *Judices* or *Arbitri*.

than to the Saxon course of judicial proceeding, it was a precedent which must have had much weight, and which had a direct tendency to supersede the more ancient and indefinite tribunal, and to introduce the course of decision by a limited number of suitors upon oath; in short, to establish, if not to introduce, the trial by jury, for that by suitors, or *pares curiæ*. If the experiment were first made upon the trial last stated, it was, in its result at least, a happy one; for, although the whole jury were convicted of perjury, justice was at last done to the Bishop and St. Andrew. It might well appear to be better policy to rely on the oaths of twelve men sworn to declare the truth, and liable to severe penalties for a false and corrupt verdict, than to depend on the voices of an unsworn, irresponsible, and numerous body: this seems to be the moral to be drawn from this ancient and curious record.

The jurisdiction of the ancient Saxon courts of the county or hundred, in which the laws were administered by the *pares* or *sectatores* of the county or hundred, received a mortal blow from the ordinances of the Conqueror, and the attempt afterwards made to restore them wholly failed. "For," (says Lord Hale, with some degree of acerbity,) "although the alderman or chief constable of every hundred was always to be a man learned in the laws; and although not only the freeholders, but the bishops, barons, and great men were by the laws of Henry I. appointed to attend the county court, yet they seldom attended them; or, if they did, in process of time they neglected the English laws, as great men usually do." The former part, at least, of the venerable Judge's observations is amply confirmed by historical evidence.

We learn from Glanville's admirable though brief statement of the law in the reign of Henry II., that trials by the assise and *jurata patriæ* had been established at the time when he wrote. The trial by the grand assise was first appointed in that reign, but he speaks of the ordinary assise and the *jurata patriæ* as existing institutions, which therefore may have been, and probably were, in earlier use. His work is a most valuable one for our purpose, as being of undoubted authenticity, clearly and accurately expressed, with strict adherence to forensic language, and for its fre-

quent statement of the principles of the laws which it contains, and particularly as regards those which related to the grand assise, and the functions of recognitors and jurors. We propose to refer to some of his details, with a view to show that, at the time when he wrote—that is, probably, about the year 1187—jurors of assise, as well as of the ordinary *jurata*, were mere recognitors, who decided simply upon their own knowledge of the fact, and not upon evidence laid before them, and also to exhibit the means resorted to for rendering this mode of trial effectual. We will refer, in the first place, to the account which he gives of the proceeding on a writ of right, and of the alteration introduced by establishing the trial by the grand assise. Upon complaint made to the King by the demandant of his having been deforced from his fee, and the assent of the King that the case should be decided in his court, a writ of summons was issued, commanding the tenant to restore the tenement to the demandant, or to show cause why he did not. Upon this summons, numerous excuses and essoins were allowable before the tenant was compellable to appear in court: a view of the land was then to be had; and, after all this, three more essoins were allowed, before the tenant was obliged to appear and answer. The demand was thus made:—

“I demand<sup>1</sup> against this H. half a knight’s fee, or two plough lands, in such a vill, as my right and inheritance, of which my father or my grandfather was seised in his demesne, as of fee, in the time of King Henry I. (or after the first coronation of our lord the King), and from whence he took the profits to the value of five shillings at least, as in corn, hay, and other produce; and this I am ready to prove by my freeman J.; and if any accident happen to him, by such a one, or by a third (and the demandant may thus name as many as he chooses, but one of them only shall wage the duel) who *saw* or *heard* it;—(or the demandant may use other words, thus:) and this I am ready to prove by my freeman J., to whom his father when on his death-bed enjoined, by the faith which a son owes to his father, that if he

<sup>1</sup> We have used Mr. Beames’s translation.

ever heard a claim concerning that land, he should prove this as that which his father saw and heard.”<sup>1</sup> It thus appears that the demandant was bound to offer proof, either by an actual witness of the fact, or by one who had obtained a knowledge of it in the solemn manner stated, accompanied by an injunction the most emphatic and impressive that can be conceived.<sup>2</sup> After the demandant had thus set forth his claim, it was at the election of the tenant either to defend himself by the duel, or to put himself on the King’s grand assise, and require a *recognition* which of the two had the greater right to the land in dispute. The account of this singular institution is thus stated by Glanville:—

“The Grand Assise is a certain royal benefit (*regale beneficium*) bestowed upon the people, and emanating from the clemency of the prince, with the advice of his nobles. So effectually does this proceeding preserve the lives and civil condition of men, that every one may now possess his right in safety, at the same time that he avoids the doubtful event of the duel. Nor is this all; the severe punishment of an unexpected and premature death is evaded, or at least the opprobrium of a lasting infamy of that dreadful and ignominious word<sup>3</sup> that so disgracefully resounds from the mouth of the conquered champion.

“This legal institution flows from the most profound equity. For that justice which, after many and long delays, is scarcely if ever elicited by the duel, is more advantageously and expeditiously attained through the benefit of this institution. This assise, indeed, allows not so many essoins as the duel, as will be seen in the sequel; and by this course of proceeding both the labour of men and the expences of the poor are saved. Besides, by so much as the testimony of *many credible witnesses* in judicial proceedings preponderates over that of *one only*, by so much greater equity is this institution regulated than that of the duel. For since the duel proceeds

<sup>1</sup> The singular practice thus detailed by Glanville as the *vetus consuetudo regni* is one of several circumstances tending to the conclusion that the trial by duel was resorted to by the Anglo-Saxons.

<sup>2</sup> This singular expedient for continuing testimony was consonant to the Saxon habit of providing evidence, to which we have already referred.

<sup>3</sup> Craven—a word of German origin. See note 2.



upon the testimony of one juror, this constitution requires the oaths of twelve lawful men at least."<sup>1</sup>

Glanville afterwards proceeds to state the mode of taking the recognition on the Grand Assise as follows<sup>2</sup>:—

"When the assize proceeds to make the recognition, the right will be well known either to all the jurors, or some may know it, and some not, or all may be alike ignorant concerning it. If none of them are acquainted with the truth of the matter, and this be testified upon their oaths in court, recourse must be had to others until such can be found who do know the truth of it. Should it, however, happen that some of them know the truth of the matter, and some not, the latter are to be rejected, and others summoned to court, until *twelve at least* can be found who are unanimous. But if some of the jurors should decide for one party, and some of them for the other, then others must be added until *twelve at least* can be obtained who agree in favour of one side. Each of the knights summoned for this purpose ought to swear that he will neither utter that which is false nor knowingly conceal the truth. With respect to the knowledge requisite on the part of those sworn, they should be acquainted with the merits of the cause, either from what they have personally seen and heard, or from the declarations of their fathers, and from other sources equally entitled to credit, as if falling within their own immediate knowledge."

The proceedings in the newly-established Grand Assise, thus so perspicuously stated by Glanville, present for our present purpose two important matters for observation. It is clear, in the first place, that the jurors of assize were bound to deliver their verdict upon their *own knowledge* of the fact in question, that being of course included, which a son pos-

<sup>1</sup> Glanville, lib. 2. c. 7.

<sup>2</sup> The provision made for substituting, for a rude and barbarous practice, a rational mode of proof, was humane and wise, but was founded, as it seems, on considerations of a nature and policy different from those assigned. Looking to the numerous difficulties and delays thrown in the way of a demandant in a real action, it can scarcely be doubted that they were interposed on a principle of policy in favour of the present possessor.

essed by solemn tradition from his father. This shows clearly what the duty of recognitors in this respect was, and affixes to the technical and formal word *recognoscere* a plain and certain meaning.

Another matter of interest, and of importance to our present purpose, is the practice of *afforcing* a jury, as it has since been termed, and which is also described with great clearness. From this it appears that an unanimous verdict of twelve recognitors was essential, and that such a verdict was to be obtained, in cases of doubt or disagreement, by a process of rejecting such jurors as were ignorant of the fact, and importing others who did know the fact, until twelve on the one side or other assented to the same verdict. Some machinery of this kind was obviously necessary, in order to give proper force and effect to a jury of mere recognitors, as it might very frequently happen that the twelve first sworn might have no such knowledge of the fact as would enable them to decide. The assise would, therefore, without such an aid, be far less efficient for the purpose of true decision than a large and indefinite body would usually be. We have already seen a desire manifested to correct the inconvenience of decisions by a large indefinite body of *suitors*, or *pares*, by referring to a selected few: so here it was not only desirable, but frequently necessary, that the powers of a few originally selected should, when it became necessary, be extended or *afforced* by the aid of others, and thus to unite the benefit of a trial by the *pares* or *suitors* at large, with the advantages of a trial by a jury.

Whilst Glanville is particular in treating of the Grand Assise, describing it as "*regale beneficium clementiæ principis populis indultum*," and which was, in the King's writs, termed *assisa mea*, he seems to distinguish it from the ordinary assise, and to speak of the latter as an already established institution. It is indeed probable, that when, soon after the Conquest, the County Courts, and consequently the trial by a body of *suitors* or *pares*, had fallen into disuse, and when, consequently, trials in the King's Courts became frequent, the ordinary mode of trial was by assises and juries. The trial by the assise was not heard of before the Conquest, and the term itself affords internal evidence

of Norman origin.<sup>1</sup> It seems to be also probable, that the rules which are specified by Glanville concerning the proceedings on the Grand Assise were partly at least in use as regarded the ordinary assise. In introducing the former it would be natural, so far as was consistent with the main object to be attained, viz., the relieving the tenant from the necessity of defending himself by the duel, to adopt such means as were already in use. The duty of the ordinary assise was *recognoscere*, as in the case of the Grand Assise, and the jury in each case having the same duty to perform, it may fairly be presumed that the same means would be afforded for rendering that duty effectual. And we find it to be well established that this practice was applied to juries of assise, although, as we shall presently see, not with that certainty and uniformity which, according to Glanville, governed the proceedings of the Grand Assise. Neither was the rule even as regards the Grand Assise itself, which required the unanimous verdict of twelve jurors, strictly adhered to. Although, as we have already observed, Glanville does not expressly state that the practice of *afforcement* was applicable to the ordinary assise, yet that, to a limited extent at least, it was so applicable, sufficiently appears.

According to Bracton<sup>2</sup>, in case the jurors of assise could not agree (*in unam declinare non possunt sententiam*), the assise was to be afforced according to the number of the greater part of the dissentients, or at least four or six were to be added to the others; or they were to discuss or judge (*judicare*) concerning the truth by themselves, and without the others, and then their verdict was to be allowed, and to pertain to the party with whom they concurred (*tenebit cum quibus ipsi convenient*). And thus, according to Bracton, an afforcement was of course, and not at the option of the parties.

According to Britton<sup>3</sup>, if the jurors of assise could not agree, others were to be added to the stronger part of the

<sup>1</sup> The word assise, from *asseoir*, was by an easy metaphor applicable to a jury who sat for judicial business. It was applied, also, as is well known, to numerous other institutions, in the sense of a thing appointed or settled.

<sup>2</sup> The assise might be taken by a less number than twelve, provided seven at the least appeared. Brac. lib. 4. c. 19.

<sup>3</sup> Challenge de Jurours.

jury, if the parties were willing, but if not, their judgment was to be given against the party who was unwilling; so that in case the plaintiff were unwilling, the assise remained as before, and he (the plaintiff) in mercy; and in case the disseisor was unwilling, judgment was given as though there was no defence. And if the jurors had no knowledge to enable them to declare the truth, and knew not the facts, the assise was to remain to the tenant, and the plaintiff was to be in mercy, because he had not proved his claim. And if they would not pronounce their verdict, through favour to one of the parties or other cause (*encheson*), then were they to be shut up without eating or drinking until they should have pronounced their verdict.<sup>1</sup>

It thus appears that, at the time when Britton wrote, the practice of afforcing the jury in an assise was recognised as a mode of proceeding beneficial to the administration of justice, although the means of compelling the parties to submit to it were but indirect. It appears, also, that in case they corruptly, and to favour one of the parties, refused to give their verdict, they might be constrained by imprisonment and want of food to pronounce it. According to *Fleta*<sup>2</sup>, the justices might at their election either afforce the assise by adding to them from those summoned a number equal to that of the major part of the dissentients, or compel the same jurors to give their verdict.<sup>3</sup>

The great difficulty which must<sup>4</sup> have been experienced in procuring a verdict by twelve, even by means of the practice of afforcement, probably occasioned its disuse. The practice, whilst it prevailed, must have frequently been unavailing to procure the aid of those who had the most direct knowledge of the fact, for these might be women or children, who could not act as jurors. After the practice of afforcement had been disused, it became necessary either to

<sup>1</sup> Britton. Ib.

<sup>2</sup> Lib. 4. c. 9. See Barrington on the stat. 21.

<sup>3</sup> Afforciare, juxta numerum majoris partis dissentientis, vel eosdem juratores compellere ad concordiam. — *Fleta*, lib. 4. c. 9.

<sup>4</sup> This appears from the laws passed from time to time, requiring a certain number of hundredors at the least to be impannelled. In the reign of Edward III. six are said to have been requisite, but in that of Elizabeth the number was reduced to two.

abide by the verdict of some prescribed majority of the original jurors, or to require an unanimous verdict. It is probable that much doubt and uncertainty for some time existed on this subject: indeed, several judicial authorities show that the verdict of the majority was frequently allowed to prevail<sup>1</sup>; but in the reign of Edward the Third, the rule requiring unanimity seems to have been established.

The *jurata patriæ*, consisting ordinarily of twelve jurors<sup>2</sup> taken from the vicinage of the place where the disputed fact occurred, was at the time when Glanville wrote an established recognised institution; the jurors, however, were simply *recognitors*, deciding on their own knowledge, and not, it will be seen, as *judges* of fact, on evidence laid before them.

To the antiquity of the *jurata* thus constituted, it is difficult to set any definite limit. It was a mode of proof constantly referred to in all cases of doubt on facts occurring in the King's Courts, where no particular mode of trial was prescribed by the law; and it seems, in general, that whenever there would have otherwise been a deficiency in evidence, for want of proper *testes* or provers, especially when witnesses were dead or abroad, "*ad patriam erat de necessitate recurrendum.*"<sup>3</sup>

In the case of a writ of right or assise, all doubts concerning collateral facts were to be decided by a jury of the vicinage, although not always by a jury of twelve. If, in the case of a writ of right, he who had waged the trial happened to die, it was to be decided by the vicinage whether he died a natural death, in all cases where any doubt existed as to the fact.<sup>4</sup> If on the defendant's objecting to put himself on the grand assise because both were

<sup>1</sup> The records of these cases are very curious, but our limits will not allow us to do more than refer to some of the principal cases; amongst these are a writ of right between the Abbot of Kirslead and Edmund de Eynecourt, before the Justices in Eyre, in Com. Lin. 56 H. 3.; another of an assise of novel disseisin between William Tristram and John Simenel, K. B., 14 E. 1.; in both these cases the verdict was by eleven, against the verdict of one; in each case the verdict was recorded according to the fact and judgments given *ex dicto majoris partis*. Also, in the 20th Ed. 3., Thorpe, C. J., took a verdict from eleven of the jurors, for which, however, he was, as we learn, reproved. 41. Ass. pl. 11.

<sup>2</sup> But in many instances of a greater or less number.—See Bracton.

<sup>3</sup> Brac. 398.

<sup>4</sup> Glanville, b. 1. c. 3.

descended from the same stock from which the inheritance itself descended, the tenant denied the fact, and the testimony of the kindred was doubted or denied, recourse was to be had to the vicinage, and on their finding in the affirmative the assise ceased.

The assise was also often turned into a jury, either from the nature of the fact itself upon which the suit was found to depend, as where it appeared that the injury amounted to no more than a mere trespass, or it was agreed between the parties themselves that the matter in dispute should be so dealt with.<sup>1</sup> And so it was whenever the trial *per testes* failed from death or absence. And it may be at once stated, for the sake of brevity, that this favourite mode of trial was resorted to whenever it was necessary, for the default of any other more appropriate mode, and in many instances upon election by the parties.<sup>2</sup>

It seems, therefore, to be probable, that recourse was had to this mode of trial in the King's Courts, when soon after the Conquest they in a great measure superseded the ancient Saxon Courts.<sup>3</sup> It may perhaps be difficult to limit the *inquisitio per juratam patriæ* to a time subsequent to the Conquest, as it is well known, that by a law of King Ethelred, still extant, twelve men in every hundred were with their *prepositus* sworn to present all malefactors.<sup>4</sup> The jury thus instituted has been regarded by some as the origin of our present system of jury trial. It is, however, to be observed,

<sup>1</sup> See Britton, c. 51., de assises tournès en jures.

<sup>2</sup> Glanville, b. 5. c. 4.; b. 6. c. 11.; b. 9. c. 1. Britt. c. 53. Brac. 142. Fleta, by Selden, 231.

<sup>3</sup> Inquisitions, however, were not always made by means of juries: during the Saxon æra they were frequently made by the men of different hundreds, according to the exigency of the case: in the reign of Canute, an inquiry was made before nine hundreds; and in the reign of William the II., a writ was issued to the sheriff to convene two hundreds and a half. William the Conqueror caused an inquisition to be made *per totam Angliam*. Bracton speaks of a writ of inquiry to be executed *in pleno comitatu*. — Brac. 303. b., and on Coroner's, and other Inquisitions, the villatæ joined: see 4 Ed. 1. st. 2. and Brac. lib. 3. c. 22.

<sup>4</sup> Et habeantur placita in singulis Wapentachiis; et exeant seniores xii tayni et prepositus cum eis, et jurent super sanctuarium quod eis dabitur in manus quod neminem innocentem velint accusare vel noxium conelare — et omnis infamatus homo vadat ad triplex ordalium, vel reddat quadruplum. — Ancient Laws, &c., 125. 528.

that this was but a *jurata delatoria*, or jury of accusation, on which the party accused might be subjected to the ordeal or other mode of compurgation, but was not a jury for the trial of *disputed facts*. It is, indeed, highly probable, that this was the prototype of the succeeding and present grand juries, and was the first to make those presentments which have afterwards been frequently made by grand juries and hundredors.<sup>1</sup> It appears, however, from the authorities, that such presentments were never regarded as of great weight, but have been considered tantamount to the "common fame," or *vox populi*.<sup>2</sup>

That the *jurata patriæ*, down to the time of Glanville, and afterwards, were mere *recognitors*, deciding on their own knowledge, and not as judges of the fact, is certain. It may on this point be sufficient to refer to a passage in Bracton, who wrote in the reign of Henry III. Speaking of the difficulty which might occur in case an appellee put himself on the country in the case of a crime committed secretly, he inquires, "*sed cum patria veritatem scire non possit de tam occulto facto, quâliter liberabitur ille qui super patriam se posuerit?*" and he answers, "*revera satis liberat, quia expressè non condemnat, sicut dici potuit de charta cum satis acquietat ex quo specialiter non onerat.*"

He adds, "*Item poterit factum esse tam occultum quod secta sit nulla vel minus ritè facta tamen calumniari non poterit, quia initium facti sciri non poterit, sicut de veneno dato, et quo casu non habebit appellatus electionem utrum se ponere velit super patriam et defendere se per corpus suum, sed oportet quod defendat se per corpus suum, quia patria nihil scire poterit de facto nisi per præsumptionem et per auditum, vel per mandatum, quod quidem non sufficit ad probationem pro appellante nec pro appellato ad liberationem.*"<sup>3</sup>

Although jurors so decided on a fact upon their own

<sup>1</sup> In the St. of Northampton (A. D. 1176), mention is made of a person, "*rectatus de murthero per sacramentum xii militum de hundredo:*" and see Bract. lib. 3. c. 1. Constitutions of Clarendon, c. 6.

<sup>2</sup> According to Fleta, 52. (lib. 1. c. 34.) indictments are little deserving of credit, "*eo quod vox populi frequenter vana invenitur tam propter cupiditatem eschaetæ, quam propter odium et malam voluntatem.*"

<sup>3</sup> Bracton de Corona, 137. The same objection might be made to exclude

knowledge, it is not to be supposed that they were always required to possess actual knowledge as eye and ear witnesses of the fact<sup>1</sup>; upon a question of relationship it was not necessary to prove the fact by parents or relations, the verdict of the vicinage was sufficient. And where greater certainty was unattainable, a jury might give a verdict *ex credulitate* or *ex conscientia*.<sup>2</sup> So a jury might even find the contents of a deed although none were laid before them. So jurors were frequently permitted to state that they had not seen the very fact, but that they had seen other facts which they stated, or that they had heard from others the particular facts which they had stated.<sup>3</sup> It is probable that as the practice of afforcing juries declined, the strictness of the rule as to their knowledge was relaxed. It appears to have been the custom, especially where suspicion had been excited, for the Court to examine the jury as to the grounds of their verdict; a useful course, it was said, because it might turn out that they derived their information from one of their own party, and that he knew it only from having heard it from some worthless fellow (*ribaun*), or at a tavern.<sup>4</sup> And it appears that upon criminal charges, affecting life or limb, the verdict was to be on personal knowledge of the fact.<sup>5</sup>

It may be doubted whether the doctrine of afforcement was applied to juries, especially on criminal trials.

The account given by Bracton as to the trial by the country, on a criminal charge, is very obscure. It was to be by twelve

a juror from being sworn which would be sufficient to exclude a witness from testifying.—Brac. lib. 4. c. 19.

<sup>1</sup> In the case of a writ of right, it was sufficient, as we have seen, that the very witness adduced by the demandant in support of his claim, and who was to enforce it by battle, had derived his knowledge from his father.

<sup>2</sup> Fleta, lib. 4. c. 9.

<sup>3</sup> Brac. 398. If the witnesses to a deed were dead or abroad, *ad patriam erat de necessitate recurrendum*. Ib. The st. 12 Ed. 2. expressly provides that a jury may proceed to inquire of a deed without the witnesses. A verdict was not trusted, "*si omnes instruuntur per unum qui non fuerit ex juratoribus*." Fleta, lib 1. c. 34. This seems to admit the implication that the verdict would be good although it appeared that all the information had been received from one person, provided he were a juror.

<sup>4</sup> Britton, c. 4. Bracton, lib. 4. c. 19.

<sup>5</sup> 2 Reeve, 629. Britton, c. 4.



jurors<sup>1</sup> consisting of *milites* or *liberi et legales homines* of the hundred<sup>2</sup>, and four *villatæ*.<sup>3</sup> It also appears that the *villatæ* were part of the inquest; they were sworn *dicere veritatem*, and were challengeable.<sup>4</sup> Their number, however, is left indefinite; and it is not stated what number of the twelve *juratores* merely, or of the *juratores et quatuor villatæ*, was competent to convict.<sup>5</sup> The statements of Britton and Fleta on this head are also exceedingly loose and unsatisfactory. Britton says, “Et s’ilz ne se poient accorder a une voluntera, si soient severès, et examinès pur quoy ilz ne poient a uner, et si la greyvure partie se tiendra, et si ils dient sur leur sermentz, que ils ne se vent rien del fait, soient puyz autres que le se vent.” This passage is evidently incorrect; and, in Wingate’s edition, instead of the words “et si la greyvure partie se tiendra,” are substituted (in the corrections), “et si la greindre partie de eux sache la verité, et partie nient, soit jugé par la ou la greindre partie se tiendra.” Even this correction leaves it doubtful whether a majority of the twelve was essential to the decision, or whether even a smaller number might not be sufficient, in case they were a majority

<sup>1</sup> Lib. 3. c. 22. *Præsentibus, igitur xii juratoribus et quatuor villatis, imprimis jurabit quilibet de villatâ per se vel omnes simul, erectis sursum manibus, in hæc verba; quod veritatem dicemus de iis quæ a nobis requiretis ex parte Domini Regis, &c.*

<sup>2</sup> Brac. lib. 3. c. 1.

<sup>3</sup> According to Spelman (*voce Villata*), the *villata* meant the collective body of the township; “dicuntur villæ inhabitantes, villæ quasi communitas.” Whether the verdict was to be so given by inhabitants of different vills as under the St. 4. Ed. 1. st. 2. (of coroners) or as is more probable (some emendation of the text being requisite) by four inhabitants of the *same* vill added to the twelve other jurors, perfect unanimity does not appear to have been essential.

<sup>4</sup> According to the authority 23 Ass. 11., a mere witness, not being of the inquest, was not challengeable.

<sup>5</sup> It is possible that the *villatæ* may have been joined merely for the purpose of testimony, in which case their number could not well be defined; it might depend upon circumstances. They were sworn, not *recognoscere*, but *dicere veritatem*, and it seems, from the slight allusion to them by Fleta, lib. 1. c. 34. as if the jury might derive their knowledge from the *villatæ*, provided the latter did not derive it from an impure source, but that the jury could not derive their knowledge from any but one of the *villatæ*. If the *villatæ* had voices in the verdict, and were not limited in number, the mode of trial, thus constituted, was intermediate between one by an indefinite body and a jury, and indicates a state of transition to the trial by a mere jury.

as compared with those who, asserting a knowledge of the fact, differed from them, the rest professing ignorance: as, for example, if four were for a conviction, three for acquittal, and the rest professed total ignorance. The law on the subject, as laid down by Fleta, does not remove the difficulty. If (he says)<sup>1</sup> the jurors do not agree, they are to be examined separately; and those suspected of malicious motives, or of having been unlawfully prompted to condemn—"Suspecti qui nequiter propter cupiditatem eschaetæ terræ defensoris vel hujusmodi inculpatum damnare intendunt, penitus amoveantur &c. et novi eligantur juratores qui primis jungantur juratoribus nisi primi fuerint omnes suspecti, et sic fiat donec veredictum unanimiter proferatur, et non per dietam vel prisonæ exactionem nisi in casu ubi inculpatus in alios se ponere noluerit."

The process thus set forth by Fleta was applicable only where, in case the jurors could not agree, inquiry was made as to the cause of difference, and particular jurors were rejected by reason of suspicion of ill-will or prejudices unduly created. No provision, therefore, is here made for any case of difference amongst the jurors, where the jurors themselves, professing to know the facts, were above the reach of suspicion.

Upon the whole it seems to be highly probable, that unanimity in the verdict was not necessary, and that either the verdict of a majority of the jury originally appointed was allowed to prevail, or that the jury was afforced; in which case, although a verdict by twelve was obtained, it might be that eleven others dissented.

Formerly a *jurata patriæ*, as distinguished from the assise, was not liable to an attain for a false verdict, as the assise was, because, as was said, they were appointed as it were arbiters by the assent of the parties; this may have been, because they were not expected to possess so precise a knowledge of the collateral fact which they had to decide, as the assise were presumed to have of the principal point in controversy; but, by the 38th chapter of the Statute of West-

<sup>1</sup> Lib. 1. c. 34.

minster, a jury were subject to attain for a false verdict on a plea of land. It was also provided by the same statute, c. 30., that justices appointed to take the assises shall not compel jurors to say precisely whether it is a disseisin or not, provided they will declare the truth of the fact; but that if they will, *sponte suâ*, say that it is a disseisin or not, their verdict shall be taken at their peril.

It is well known that in the present County Court—a tribunal undoubtedly of Saxon origin, in which the whole body of suitors once actually decided, as they still do in theory—the verdict is in truth given by twelve jurors upon oath, as well in the case where the ordinary court is held before the sheriff without writ, as where it is specially held by virtue of the Queen's writ of *justicies*. It does not appear at what precise time this change took place. In both of the celebrated trials in this court in the reign of William the Conqueror, to which allusion has already been made, the proceeding was *coram pleno comitatu*. But we also learn, from the latter of those trials, that the decision of the *comitatus* was required to be confirmed by the oaths of twelve of the suitors. Looking to this precedent, which thus occurred in the County Court, and the example afforded by the institution of the ordinary assise, which probably occurred very soon after the Conquest, it is probable that the transfer of the duty from the whole body of the *comitatus* to a jury took place at no distant period after the Conquest, and previous to the time of legal memory. Similar changes also took place in some, at least, of the inferior manorial courts: the consideration that in these the practice of presentment by a jury probably rests on ancient custom, affords confirmation that it existed before the time of legal memory. We learn also from Bracton, that, when an inquiry was made before the sheriff in the county, it took place before a jury summoned from the vicinage to *recognise*, &c. as in ordinary cases.

The duties of compurgators have by some been assimilated with those of the jury; they were, in truth, very different.

The office of jurors was, from the earliest account we have of their history, *recognoscere*—to declare the truth on some inquest directed to be made, without reference to party; whilst the duty of a compurgator was merely *ex parte*, in

order to exonerate another from some claim or charge to which he was apparently liable, and this was done usually, if not universally, by merely swearing to *belief* concerning the fact.<sup>1</sup> It has been stated, and with great appearance of probability, that the wager of law as a mode of trial was established on the principle that an innocent man might be overcome by a multitude of false witnesses. And therefore, so long as he was *legalis homo*<sup>2</sup>, a man of unimpeached character<sup>3</sup>, he might defend himself against mere witnesses *per legem*; that is, if he would absolutely swear, in his own person, that he was not chargeable, and produce a sufficient number of persons of his neighbourhood who would swear that they believed what he said to be true.<sup>4</sup>

Our inquiries hitherto have been confined to two of the classes of popular tribunals originally proposed for consideration: viz., that consisting of an indefinite number of a general class of suitors, pares, or resiants; and 2dly, that of a jury of mere recognitors, bound to decide on their own knowledge of the fact, and not as judges on evidence laid before them. We are now to turn our attention to that more interesting era in the history of the Jury, when they first began to act in a much higher and more important capacity than they had done before.

Before we proceed to detail some of the circumstances attendant on this important change, it may be proper to premise a few remarks. It is material to observe, that even amongst jurors of mere conusance, a latent tendency must have existed to judge mutually of each other's knowledge. It could rarely, if ever, happen, that all the jurors possessing knowledge of the fact were actual witnesses of the fact,

<sup>1</sup> The custom was in use amongst the Normans. By a law of Will. I. upon an Englishman's declining the battle, the Norman might purge himself by swearing according to the law of Normandy. By the Anglo-Saxon law hosts of witnesses to belief were sometimes sworn for the purpose of *crimination*.

<sup>2</sup> Those who had been convicted of a false verdict lost, *inter alia*, their "*liberum legem*," and for ever after were deemed to be infamous. Glanville, c. 19. So according to Bracton, "he ne es othesworthe, that es enes gylty of oth broken." Lib. 3. c. 19.

<sup>3</sup> i. e., legally unimpeached.

<sup>4</sup> See Worthington's Inquiry as to the power of juries to decide incidentally questions of law (p. 51.),—a work which well elucidates the subject which its title announces.

especially as regards criminal inquiries; possessing, however, knowledge of different facts and circumstances of the transaction, they might, by conference, and comparison of the facts which had come to their knowledge, attain to a just conclusion. Whilst the power of judging would, to this extent, be naturally developed without aid from any express rule of law, the legal recognition of its exercise would be rendered necessary when complicated pleas or issues were submitted to a jury. When an issue involved distinct branches of inquiry, a general verdict could seldom be given upon it by one jury, unless they mutually judged of each other's testimony. It would frequently happen that, although one or more jurors had knowledge of one fact, they had none of some other fact equally essential to the verdict, and that those who knew the latter fact were ignorant as to the former, and, therefore, in venturing to give a general verdict upon oath, and subject to the peril consequent on giving a false verdict, every juror must, as to any fact not within his own knowledge, have virtually sworn to his belief of it upon the statement of his cojurors. To take a simple case: Let it be supposed that a deed was questioned, as well as regarded the facts of sealing and delivering as the sanity of the alleged obligor. Upon an issue on the validity of the deed, some of the jurors might know the mere facts of sealing and delivering, but nothing of the state of the obligor's mind; these could do no more than state their knowledge of those facts, whilst others might be able to speak to their knowledge of the party's sanity; a general verdict then would be founded on every juror's knowledge as to part, on his judgment as to the statement of others as to the rest. And it is evident that the law, in awarding a trial of the compound issue by a jury who were thus to decide on the whole question, would recognise such a mode of deciding. That mode would be still more distinctly sanctioned if the witnesses to the deed were impannelled as part of the jury. That is, if, instead of having a trial *per testes* as to the mere execution of the deed, and one by the country as to the sanity of the party, there were to be one trial as to both. This would obviously be advantageous; the other jurors would have all the benefit of the knowledge which the witnesses to the deed had of the facts attending

the execution of the deed, and would, at the same time, exercise a salutary discretion in judging of their testimony. On the other hand, the practice might be attended with this inconvenience; some witnesses might differ from the rest as to the proper inference from the facts which they knew, in which case the verdict would not be unanimous, and the question would arise, which ought to prevail. This difficulty again would be obviated, partially at least, by distinguishing between mere witnesses of fact and judges of testimony. Without further indulging in mere conjecture, we proceed to state the changes which really occurred.

We find, in the first place, that in the reign of Henry III. the trial *per patriam et testes* had become common in practice, where the issue involved the existence of a deed. Thus, where land having been claimed on gift by virtue of a charter of feoffment, it was excepted against the charter that it was made when the supposed donor was of non-sane mind, or under duress, the supposed donor having reclaimed the land as soon as he could, the writ in such case directed the sheriff to summon A. and B., the witnesses named, &c., and besides *eight* others as well knights, &c., to recognise upon oath whether the said C., being of sound mind, &c., gave to B. such land, with the appurtenants, and executed his deed thereof, &c.; for that E., the son and heir of C., had claimed the said land, and says that the said C., his father, never gave the said land to the said B., and that, if he ever did so, it was during sickness, of which he died, and after he had lost his memory, &c., because as well the said E. as the said D. have put themselves on the country.<sup>1</sup> So, where the *testes* happened to reside in two or more different counties, they were summoned by writs directed to the sheriffs of those different counties, as also were jurors from each. And if in such a case (says Bracton), i. e. of a disputed deed of gift, when the *testes* and *recognitors* shall have appeared in court, they say on their oath that they were present when the gift was made, and that in their presence the deed of gift was read and heard, and homage taken, and seisin law-

<sup>1</sup> This mode of trial seems to have been optional with the parties. Quandoque fit inquisitio tantum per testes et quandoque per alios quam testes, si partes hoc voluerint. Brac. 396.

fully delivered to the donee in their presence, and in due form, the deed will be valid and the gift lawful.

We now proceed to notice an authority of great importance to our present purpose. We find, that in the 23d year of Edward the Third, the witnesses were *adjoined* (*aiointés*)<sup>1</sup> to the jury, for the purpose of aiding them by their testimony, but having no voice in the verdict; and that, on the contrary, the verdict of the jury was to prevail, even though directly opposed to the evidence of witnesses. An assise<sup>2</sup> was brought against several, all of whom but one pleaded to the assise, and he took on himself (*emprist*) the tenancy, and pleaded in bar a release by the plaintiff, in which several witnesses were named; the deed was denied, wherefore process was issued to cause the witnesses to come as *well as the assise*. And one of the witnesses was named in the panel amongst those of the assise, and he was ousted; for it was said by Thorpe, C. J., that though twenty witnesses were named in the deed, the Court would take an assise beside the witnesses, and that they should only be *adjoined* to the assise and testify the truth.<sup>3</sup> And one of the witnesses was challenged because he was cousin to the plaintiff, *et non allocatur*; for witnesses are not challengeable, because the verdict shall not be received from them, but from the assise; and the witnesses shall be sworn simply to *speake the truth*, without saying *according to their knowledge*, for they ought to testify nothing but that which they shall *see* and *hear*. And the assise was taken, and the witnesses were *adjoined* to them, and they found that the deed before mentioned was false. And it was adjudged that the plaintiff should recover his seisin and damages, and that he who had pleaded the release should be taken for the false deed which he had produced &c. And Kelby prayed that the deed should be condemned (*damné*); but, by Thorpe, this shall not be, for the tenant may have an attain, inasmuch as the verdict has

<sup>1</sup> It will be seen that the writ, as above cited from Bracton, directs the summoning of the witnesses and *eight* milites; it is probable that so many of the latter were summoned as with the witnesses amounted to twelve. In the case above cited it will appear that the witnesses were *adjoined* to a full inquest of twelve.

<sup>2</sup> Lib. Ass. 23 E. 3. pl. 11.

<sup>3</sup> Et eux ne serr̄ forsqr aiointes a l'assise et testm̄ la verité.

passed negating his plea<sup>1</sup>, although the witnesses were parties to this verdict, for the witnesses ought to testify nothing, except that of which they are certain, scil., that which they shall *see* and *hear*. He adds afterwards, "But the deed shall be enrolled word for word, so that the tenant shall never have advantage of it except by way of an *attaint*." And also, it was said, that in a case where witnesses are *adjoined* to an inquest, *and the witnesses and inquest cannot agree in their verdict*, the *verdict of the inquest* shall be taken.

The first point in the above curious and interesting report that claims observation is, that although the witnesses and assise seem to have been included in the same process, no witness could be included in the assise. On this question Thorpe, C. J., seems to have spoken somewhat emphatically, declaring, that though there were a score of witnesses, none of them should be included in the assise. This seems to have been a departure from the practice of trial *per patriam et testes* in the reign of Henry III., when the *testes* seem to have been included with the *patria* in the same inquest.<sup>2</sup> Then, it was said, that the witnesses were to be only *adjoined* (*aiointès*) to the assise, and testify the truth. This also indicates a most important departure from the former practice. The jury were thus afforded in point of knowledge and *information*, but not *in number*, and thus the jury *judged*, of necessity, *upon the evidence* submitted by the witnesses. Next it was held that a witness of kin to one of the parties could not be challenged on that ground, because, as was said, the verdict could not be received from the witnesses, but only from the assise, and because witnesses were sworn simply to speak the truth, without saying according to their knowledge (*a leur estiant*), for they ought to testify nothing except that which they shall see and hear. It thus appears that the duty of a mere witness was understood to consist merely in the detail of facts which he had actually seen or heard, as distinguished from any statement of knowledge through other means; it follows that the assise or jury were entrusted with the power of *judging on these facts*, to enable them to return a proper verdict. The witnesses and assise

<sup>1</sup> Quant le verdict est passe sur parol neg.

<sup>2</sup> See note.1. p. 393.



having found, in conjunction, that the deed was false, judgment was awarded for the plaintiff. But, (on motion made that the deed should be condemned) the question arose incidentally whether the defendant might not have his remedy by *attaint*, and Thorpe, C. J., held that he might, for although the witnesses joined in the verdict, yet, as their duty was simply to declare what they had seen and heard, the verdict was that of the inquest, and it was said that, even had the inquest and witnesses disagreed as to the verdict, the verdict of the inquest should be taken.<sup>1</sup>

It appears then from this authority that the transition had then been made from a jury of mere recognitors to one empowered to decide on testimony laid before them; that is, from a tribunal included within the second to one within the third of the classes above distinguished. For it is to be recollected that, although the powers of the jury were greatly extended when they were thus enabled to judge of testimony, they were yet required to decide on their own knowledge of the fact when they possessed any such, and were still required to be summoned from the vicinage. It is also observable, that the authorities which we have referred to relate to documentary witnesses. But although the transition may have been at first but partial, still it was complete so far as regarded the plainly marked distinction between a jury deciding merely on their own knowledge, and one judging on the testimony of mere witnesses. It can scarcely be doubted that, when the practice of hearing evidence before jurors at the bar, before they had retired to consider of their verdict, had been established as regarded charters and deeds, it was soon afterwards extended to all other documentary evidence, and to any other kind of evidence which they were permitted to hear.<sup>2</sup>

<sup>1</sup> The concluding words of the report are "*Et auxy fuit parlé q'en case testm sont aioint a un enquest et les testm et l'enquest ne puissent pas assenter a un verdict, le verdict serr pris de lenquest a per luy, et en tiel cas la partie conter que il passa puit aver l'attaint, &c.*" It seems to be not improbable that the words *a per luy* require correction, the real meaning may have been that in case the inquest dissented from the witnesses, the verdict of the former was to be taken at their peril.

<sup>2</sup> The hearing of evidence at the bar was certainly in practice in the eleventh year of Henry IV.

In the second year of the reign of Edward VI. we find an interesting statement concerning the functions of a jury made by Sir Robert Brooke, the Recorder of London, in the case of *Reniger v. Fagossa*.<sup>1</sup>

“As to that which has been said by the King’s attorney, that there ought to be two witnesses to prove the fact, it is true that there ought to be two witnesses at least where the matter is to be tried by witnesses only<sup>2</sup>, as in the civil law, but here the issue was to be tried by twelve men, in which case *witnesses are not necessary*, for in many cases an inquest shall give a precise verdict although there are not witnesses, or no evidence given to them. As, if it be found before the coroner, *super visum corporis*, that I. S. killed the dead person, and he is arraigned and acquitted, the inquest shall say who killed him although they have not any witnesses, so that witnesses are not necessary but where the matter is to be tried by witnesses only.<sup>3</sup> For if witnesses were so necessary, then it would follow that the jurors could not give a verdict contrary to the witnesses, whereas the law is quite otherwise, for when the witnesses for trial of a fact are joined to the inquest, if they cannot agree with the jurors, the *verdict of the twelve shall be taken, and the witnesses shall be rejected*: therefore this point is clear enough.”

We will now pause to consider the importance of the transition thus made. Jurors, from being as it were mere mechanical recipients and depositaries of knowledge, which they communicated on inquiry made, exercised the more intellectual faculty of forming conclusions from testimony, a duty not only of high importance with a view to truth and justice, but also collaterally, in encouraging habits of reflection and reasoning, which must have had a great and most beneficial effect in promoting civilisation. The changes in legal practice naturally, nay, almost necessarily, consequent on the transition, were very remarkable. It is proper,

<sup>1</sup> Plowd. Com. 12.

<sup>2</sup> This however seems to be incorrect: one witness, by the law of England, seems to have been sufficient, although the authorities are not uniform.

<sup>3</sup> From these positions it appears, that in the reign of Ed. VI. jurors were regarded as exercising the mixed function, to which we have adverted; acting partly as recognitors, partly as judges on evidence.

before we advert to them, to observe that, previous to this transition, and whilst jurors were mere recognitors, the Court exercised a very vigilant superintendence in examining the jurors separately, whenever such examination appeared to be necessary in order to ascertain whether the knowledge of the fact in question which they professed to have, was drawn from legitimate and credible sources. This security for the truth of a verdict of course failed, when the jurors themselves might found their verdict merely on the evidence of witnesses.

Superintendence for the purpose of excluding evidence from impure or suspected sources could not then be exercised unless the evidence were given in the hearing of the Court. This was accordingly done. The change probably occurred soon after the alteration made by adjoining the witnesses to the jury: it certainly had been made in the 11th year of Henry IV., as we find from the report of a case of that date that a verdict was set aside because the jury, on their departure from the bar to consider their verdict, had taken with them an escrow which had not been proved in evidence at the bar by the party, nor delivered to them by the Court.

The exercise of this kind of control was, in truth, the foundation of that system of rules concerning evidence before juries, which has since constituted so large and important a branch of the law of England. The great and leading principle on which its numerous rules depend, is the exclusion of all such evidence from the jury as is likely to mislead or prejudice their judgment: they are, indeed, the rules on which the Courts act in exercising a control in respect of the kind of knowledge which a jury ought to possess to warrant their verdict, and which was originally exercised by examining the jurors themselves. The practice of receiving evidence openly at the bar immediately led to another remarkable result,—the great extension of the duty of an advocate. In earlier times a trial was a very quiet and comparatively dull and uninteresting proceeding. Upon criminal as well as civil inquiries the jury, after they had been sworn and merely charged by the Court as to the points at issue, retired to consult together in secret, without hearing either witnesses or counsel at the bar: But now the scene

was totally changed; witnesses were examined and cross-examined in open court; the flood-gates of forensic eloquence were opened, and full scope given to the advocate to exercise his ingenuity and powers of persuasion on the jurors, to whose discretion the power of judging on matters of fact was now entrusted.<sup>1</sup> Even still another and very important consequence claims remark. When a jury who gave or were presumed to give their verdict as upon a fact within their own knowledge came to a wrong decision, they must usually have been guilty of perjury, and, consequently, an attaint for their false verdict was a reasonable mode of proceeding against them. When they became judges of the fact upon evidence, the liability to attaint evidently became unjust and impolitic, because it placed jurors in jeopardy for mere error in judgment. The proceeding by attaint, therefore, virtually fell into disuse, and the means of correcting error and mistake on the part of a jury were left without adequate remedy until the middle of the 17th century, when the practice of granting new trials became common. It is singular that the consideration of questions arising upon motions for new trials, a duty<sup>2</sup> which now occupies so large a portion of the time and attention of the common-law Courts, should not have had an earlier commencement, when it is recollected that the trial by jury had then been practised in this country for the space of five centuries at the least. We have seen, however, that jurors do not appear to have

<sup>1</sup> It is difficult at this time of day to form any just and distinct conception of the revolution in legal habits and practices occasioned by this change. Before it had taken place, the lawyer's time and attention must have been occupied by the dull pedantry of technical forms, and minute and subtle legal distinctions, oftentimes founded on arbitrary antiquated principles; his arguments were confined to solemn debates on venues, discontinuances, miscontinuances, disseisins, colour, cum plurimis similibus, now seldom heard of. But "a change comes o'er the spirit of my dream."—The lawyer's tongue was loosened, he was no longer confined to apices juris; the halls of justice resounded with eloquent speeches to the jury, discussions as to evidence, and motions for new trials; in short, the advocate began to revel in all the multifarious matter of *Nisi Prius* business.

<sup>2</sup> It has been said that the first reported case is that of *Wood v. Gunstone*, *Style*, 462. It has also been asserted that motions for new trials were allowed at an earlier period, although not reported. It seems to be pretty clear from the observations made in the case of *Wood v. Gunstone*, that although the practice might not be new, it had by no means become common.

acted as judges of the fact upon evidence laid before them till the reign of Edward III.

As our present object is to trace the history of the jury trial, we should be guilty of a departure in entering upon a consideration of the practical effect of this change, in occasioning so large an accession to the ordinary business of the Courts of Common Law in deciding on applications for new trials. Be it for good, or be it for evil, motions for new trials, which, until the middle of the seventeenth century, were, if not altogether unknown, exceedingly rare, now occupy a very considerable portion of the time of those courts.

Having now considered the period during which the jury exercised the mixed functions of recognitors on their own knowledge, and judges of the fact upon evidence laid before them, we advert to the last of the transitions to which we have alluded, which consisted merely in limiting their duty to the latter of these functions. This has been made in comparatively modern times, and being, consequently, matter of notoriety, may be briefly dispatched. The principles which warranted such a change are obvious;—it was found that the cause of truth suffered more from the prejudices which the residence of jurors in the neighbourhood of the disputed fact were likely to engender, than was gained from knowledge and means of judging so acquired. This would, no doubt, have been of itself a conclusive reason for the alteration; but, in addition to this, it appears from the reports, that the rules as to *venue* were productive of such frequent doubts, and so much litigation, that it became highly expedient to get rid of them.

The necessity for having hundredors on the inquest was altered, as respects their number, from time to time. In the reign of Edward III., the attendance of six was necessary, but in that of Henry VI. the number was reduced to four; and although in the reign of Henry VIII. six were again required, in the reign of Queen Elizabeth<sup>1</sup> the number was reduced to two. The practice, however, was exceedingly irksome, and frequent evasions were favoured.<sup>2</sup> Afterwards, by the 4 & 5 Anne, c. 16., and 24

<sup>1</sup> 27 Eliz. c. 6.

<sup>2</sup> 1 Ins. 157.

G. 2. c. 18., the law requiring jurors to be returned from the vicinage or hundred was abolished in all civil actions, and it was directed that they should be summoned from the body of the county.

Although so far as the statutes above cited extended it was no longer necessary that the jury should be returned from the vicinage, these enactments constituted but indirect authorities for the position, that juries ought not or might not still rely on their own knowledge of the fact. This may seem, perhaps, to have been virtually decided by the Courts when they first began to grant new trials, on the ground that the verdict was against evidence, or not supported by evidence, for so long as juries might have so decided it could not have been properly assumed that the verdict had not proceeded on the jurors' own knowledge of the fact. An express judicial declaration on this subject was made by the Court of Queen's Bench in the first year of Queen Anne, to the effect, that if a jury give a verdict of their own knowledge, they ought to tell the Court so, *that they may be sworn as witnesses*, and that the fair way was, to tell the Court, before they were sworn as jurors, that they had evidence to give.<sup>1</sup> And in the case of *Smith v. Parkhurst*<sup>2</sup>, the case of *Kitchen v. Manwaring*<sup>3</sup> was cited, to which a new trial was prayed for, because after the withdrawing of the jury one of them offered evidence to the others, and it was refused only because Powel, J., who tried the cause, reported that the verdict was according to the evidence, otherwise it would have been granted.

It appears, from what has been said, that the jury of the present day is distinctly traceable to the *jurata patriæ*, which was recognised in the reign of Henry the Second as an established institution, and which, in all probability, existed before the Conquest. That although the functions of the ancient and modern juries are completely distinct, the former being mere recognitors, deciding on their own knowledge,

<sup>1</sup> Pasc. 1 Ann., 1 Salk. 405. It is stated in 2 Hale's P. C. 306., that if a jurymen have a piece of evidence in his pocket, and after the jury have been sworn and gone together, he show it them, this is a misdemeanor, and finable in the jury, but it avoids not the verdict.— 23 C. 1.

<sup>2</sup> Andrew, 315.

<sup>3</sup> As decided in *K. B., Pasc., 12 G. 1.*

whilst the latter are judges of the fact upon evidence, yet are they completely connected by the jury of mixed functions. That these transitions have been improvements gradually made for convenience sake, the original tribunal being one of the most simple form. The question, therefore, when did the trial by jury begin, admits of no definite answer, otherwise than as regards the different transitions which have been alluded to. It is only in modern times that the institution has been reduced to its present form, by excluding the exercise of a mixed function, and confining the duty of a jury solely to the judging of facts on evidence laid before them, to the rejection of any private knowledge of their own. This transition was complete when the legislature rendered it unnecessary that the jury should be of the vicinage, it having been judicially decided that a juror who had knowledge of any material fact ought not to communicate it privately to his fellows, but that he ought to be examined, as any other witness was, upon oath, in open court. This, it appears, was declared in the first year of the reign of Queen Anne. The jury of mixed functions may, for the reasons already stated, be fairly ascribed to the reign of Edward III., for it was then judicially declared, that the verdict of the jury was good, although it varied from the opinion of the witnesses joined with the jury. At what time inquiry was first made by a jury of simple recognitors, it seems to be now impossible to ascertain; probably the practice was in use before the Conquest, even as regards the trial of facts: that preliminary inquisitions in criminal cases were in use before that time is certain.

It also appears from what has been said, how little foundation there is for the notion, that the unanimity of the jury in a criminal case was required on a principle of compassion: in times of remote antiquity, unanimity was not essential in any case, civil or criminal, although in later times the rule which was established in criminal applied also to civil proceedings.<sup>1</sup>

<sup>1</sup> According to the Mirror, indeed, an unanimous verdict by a jury of twelve was essential to a conviction in the time of king Alfred. According to him king Alfred was much in the habit of hanging unjust judges, and executed no fewer than 44 in one year. Amongst others we find that he (Alfred) hanged *Cadwine*, because that he judged Hackwy to death without the consent of *all the jurors*,

It will also be seen from what we have said, how completely the principle and character of the institution has been gradually changed, while its identity has been preserved unbroken by any peremptory ordinance. It is also worth while to remark, how slow the progress of this institution has been. Almost seven centuries have elapsed since the time when the jury was treated of by Glanville as an established recognised tribunal. The jurors were, however, then mere recognitors, deciding on their own knowledge of the fact, and so they continued to be in the thirteenth century, when in the reign of Henry the Third we find the mode of trial used *per patriam et testes*. It was not till the middle of the fourteenth century that we find witnesses made adjuncts to the jury, and the testimony of the former declared to be subject to the judgment of the latter. And although, when the power of the jury to judge on evidence had thus received legal sanction, the doctrine of attainr was no longer in principle applicable, it still continued to be the only means to which a party could resort to get rid of a false verdict until the middle of the seventeenth century, when the present practice of granting new trials was substituted. Long after the ancient practice of proceeding by attainr had fallen into disuse, and at least four hundred and fifty years after the time when such a proceeding could in principle be applicable, it was deemed proper expressly to abolish it.<sup>1</sup> Again, great and beneficial as the change was in the constitution of the jury, when they became judges of the fact nearly five centuries ago, it is singular that for so long a time they should still have been considered as acting partly also as recognitors on their own knowledge of facts, notwithstanding the numerous difficulties with which the old doctrine as to venue was beset, and which continued to be the law until they were at last removed by the means already stated.

Although the present jury law has, no doubt, been greatly

whereas he stood on the jury of twelve men, and because the three would have saved him against the nine, Cadwine removed the three, and put others upon the jury, upon whom Hackwy put not himself. This account, though probably fabulous, may yet afford some evidence as to the state of the jury at the time when the author wrote.

<sup>1</sup> It is well that the virtual repeal of an unjust and absurd law does not always await the tardy progress of legislation.



improved by a series of gradual changes, to the most important of which we have adverted, and which have been adopted as convenience dictated to suit the exigencies of justice, it must not be supposed that the institution is not capable of improvement, or even that it does not contain some considerable imperfections. The consideration of these does not fall within the scope of our present design ; we will, however, allude to one, which may also be cited as a strong instance to show the danger of leaving legal improvements to the slow process of gradual change arising out of circumstances : we allude to the rule which requires jurors to be unanimous in their verdict. In the case of a popular tribunal consisting of a body or class of persons, of indefinite number, to require unanimity in their verdict would of course be absurd ; where a peer is at this day tried before the House of Lords on a charge of felony, a bare majority is sufficient to support a conviction. It has been seen that formerly, where jurors could not agree in their verdict upon an assise, they were afforced ; that is, an addition was made to their knowledge and means of judging by adding to their number others acquainted with the fact ; this was a reasonable practice : in other cases it is probable that the juries were either afforced, or that the decision of the original juries depended on the opinion of the majority. The practice of afforcement being inconvenient, fell into disuse, and it became a settled rule that the verdict should be the unanimous verdict of the original twelve jurors ; and that in case of disagreement means should be used to compel them by confining them together without allowing food or fire, or communication with others, until they had agreed ; and if not before agreed, by conveying them in carts after the judge in his progress on the circuit to the border of the county.<sup>1</sup> This practice, so contrary to reason, appears to have been introduced simply to get rid of a practice which, though reasonable in itself<sup>2</sup>, was found to be attended with trouble.

The principle of the rule concerning the unanimity of

<sup>1</sup> 41. Ass. pl. 11. Et nota que les justice disent quilz duissent aver carie l'assise ovesque eux en charr tanqe ils fuissent accord, &c. It was also decided there that the taking the verdict of eleven, and committing the twelfth juror because he dissented from the verdict of the others, was illegal.

<sup>2</sup> That is, when jurors were mere recognitors.

jurors consists in establishing an artificial test of truth, such that a party, on whom the onus of proving the affirmative is thrown must fail, unless twelve jurors agree in finding the truth of that affirmative upon oath. This is in itself an unreasonable test, which must often exclude the truth, even where there is great preponderance of probability in its favour; it gives far too great a weight to the probable error of a single individual who differs in his judgment from the rest, and enables a dishonest juror to commit gross injustice. The law proposes to remedy the defect, not by compelling the jurors to agree, for that is impossible, but by forcing them to say that they agree; the test, therefore, is in truth abandoned: not only so, but another, and that, a strange one, is substituted; the verdict is to depend on the juror who can longest endure cold, hunger, thirst, confinement, and want of rest.

We have no room at present to expatiate upon the numerous objections which array themselves against such a merely artificial, peremptory, and indiscriminating rule, which applies equally to cases where the issue of life or death is involved, as it does to mere cases of civil right, which ought to be governed by little, if any thing, more than a mere preponderance of opinion. Whilst many beneficial changes have been introduced, as we have seen, in more enlightened ages, this rule has descended to us in a state of unmitigated barbarism. Intending to resume our observations at a future opportunity, we shall have attained our present object if, by any of our details or remarks, we may have succeeded in stimulating inquiry upon so important a subject as that of the Trial by Jury.

## ART. XI.—CONVEYANCING REFORM.

1. LORD BROUGHAM'S *Speech on Law Reform*. May 19th, 1845. Ridgway.
2. *An Act to amend the Law of Real Property*. Session 1845.
3. *An Act to facilitate the Conveyance of Real Property*. Session 1845.
4. *An Act to facilitate the granting of certain Leases*. Session 1845.
4. *Report on the Plans for shortening Legal Instruments, presented to the Society for promoting the Amendment of the Law by the Committee on the Law of Property*. 1845.

WE are now desirous of introducing to our readers an alteration in the practice of the law for which we believe the profession is ripe. Like other great changes, for it must doubtless when fully worked out be a great change, it has been announced by various significant warnings proceeding from a common feeling, but from quarters entirely distinct and unconnected with each other. The days of omens and portents are past. In former times we should no doubt have heard of, if not seen them. But so far as our own information reaches, no star has shone forth at noon day; no triple sun has affrighted Lincoln's Inn with a portentous glare; no belated conveyancer, wending his solitary steps from Stone Buildings, has seen a bloody moon in an unclouded sky; comets indeed there have been, but they no longer

“Fire the length of Ophiuchus huge  
In th' arctic sky, and from their horrid hair  
Shake pestilence and war.”

But although nothing miraculous has heralded the approaching change, — although no conveyancer has left his grave to warn his brethren that common forms shall cease to exist, — yet assuredly their days are numbered, and it needs

no spirit of prophecy to enable us to predict that the present practice of conveyancing is doomed. The mutterings which have so long been heard are now becoming loud, and not to be mistaken. Although the black art may still be practised by a few, — although a knot of three or four may huddle together, and attempt to laugh at all alteration as a passing clamour not to be regarded in practice, — although some of the outlying strongholds may still set up a cry of no surrender, — yet is it certain that the victory is already gained, and the citadel delivered up.

We have already shown<sup>1</sup>, that during the last twenty years there has been a strong and increasing current of opinion that the length of deeds "had increased, was increasing, and ought to be diminished;" that while all other parts of the law had been touched with no gentle hand, deeds had remained almost unapproached; that although many men of the first eminence in this peculiar department of the profession had declared their opinion that a great change was both necessary and practicable, yet that none worthy the name had been made. But it is the peculiar advantage of truth, that once uttered it wins its way perhaps slowly, but always surely; that although apparently buried in the earth, it is engendering therein, and rises in fourfold strength to blossom and fructify. And thus has it been with the opinions which have been expressed on this subject. They have carried conviction with them, the rather that in most instances they have been decidedly against the present interest of those that have uttered them; and although often drowned in the shouting of those who "sold the silver shrines of the great goddess which brought no small gain to the craftsmen," yet eventually the true opinion has prevailed.

Let us then shortly trace the progress which has been made in this important question since we last adverted to it<sup>2</sup>, and we think we cannot put our readers more completely in possession of its present state than by making a rather long but valuable extract from the Report on this subject of the Law of Property Committee of the Law Amendment Society, of which we have obtained permission to avail ourselves.

<sup>1</sup> 1 Law Rev., 158. 382.

<sup>2</sup> 1 Law Rev., 404.

“To discover some method by which the legal instruments now employed, in dealing with property, to express or carry into effect the intention of private persons may be shortened, without lessening the certainty and precision of their operation, has for some time been an object with those who have turned their attention to plans of legal reform. The labour, and consequent expense, which would be saved by such a method are indeed so considerable, that the desire to discover and introduce it is by no means surprising. In the immediate transaction out of which any instrument arises, a considerable amount of expense is indeed in most cases unavoidable. In one form or other, such payment must be made as shall be sufficient to ensure that each instrument is properly framed. And yet, even here, the expense caused by the extreme length of legal instruments, as at present constructed, is sometimes a just cause of complaint. But this original length continually begets subsequent length and cost, in the ratio of a geometrical progression. Abstracts must be furnished, attested copies may be required; or the instrument may form a part of a declaration, or a plea, a bill, or an answer, a report, or other judicial proceeding. In these and other analogous cases, the mere mechanical labour arising out of the length of the documents adds to the expense of what is to be done, without contributing to its being done better.

“Now there are, as appears to this committee, some cases in which a complete cure may be found for this grievance, by dispensing with the use of any instrument at all: as, for instance, was done by the Act dispensing with the necessity of the lease for a year, in a lease and release. But such cases must be comparatively few. In the great majority of transactions there is no instrument used which could be dispensed with; and the only question is, how can the instruments employed be shortened without being made insecure?

“For the better examination of this question, it seems desirable briefly to consider the parts of which a deed usually consists. These parts appear reducible to two heads. We have first the recitals of the circumstances under which the instrument is made, and then we have the formal statement of the intention of the parties, and various covenants or declarations intended to express it with due precision, or secure its execution without the possibility of evasion.

“Now it is clear that the recitals cannot be directly shortened otherwise than by the discretion of the framer of the instrument containing them, because they must vary indefinitely in each case. Although, indirectly, the shortening of the instruments by which

property is dealt with would doubtless materially contribute to shorten recitals. But it is otherwise with the operative part of the instrument, and the covenants or declarations connected with it. Here there have been suggested at least four distinct plans, by which the necessity for employing many of the long forms made use of at present may be removed in numerous cases of ordinary occurrence, while the benefit now sought to be attained by their use shall be preserved.

Of these plans, the first which we would notice is the suggestion, that the liabilities or powers at present attached to or conferred upon the persons who fill certain characters, as—*e. g.* that of vendor in a deed of purchase, or trustee in a marriage settlement—by the express covenants or declarations contained in the instrument, should be attached to or conferred upon them by legislative enactment, from the mere fact of their filling the particular character. This proposal has been sanctioned by the high authority of Mr. Butler<sup>1</sup>, Mr. Tyrrell<sup>2</sup>, and Mr. Humphreys<sup>3</sup>. It has been adopted, in one instance, by the Act passed in the last session for simplifying the transfer of real property, namely, with respect to the receipts of trustees being in some cases sufficient discharges; and there are probably other cases in which it might be usefully employed. But as any extensive application of this plan to practice would obviously require much consideration, and the subject does not properly fall within the present references, it cannot be more than briefly noticed here.

“A similar observation is applicable to the second of the plans to which we have alluded, namely, to the proposal that forms of ordinary instruments, and other common forms divested of all unnecessary parts, useless words or phrases, should be prepared by persons of known eminence as conveyancers, and put forth under the sanction of the legislature, or of some commission or body appointed by the crown, as precedents, of which private individuals might avail themselves in the construction of legal instruments. Upon this proposal, however, which certainly possesses much to recommend it, and appears to have met with the approval of many persons of considerable experience in business, as well as of high legal authorities, some further remarks will be found in a subsequent part of this Report.

“The two remaining plans out of the four mentioned above constitute the more immediate subject of the reference made to this committee. Both of these plans agree in one respect, namely,

<sup>1</sup> Real Prop. Rep. I. Evid. p. 116, *e. s.*

<sup>2</sup> Suggestions to Real Prop. R. Com. I. p. 507.

<sup>3</sup> Essay on Real Property, see p. 287.

that they do not propose to strike out, or even materially to abbreviate, any part of the legal instruments now in use; but only to enable parties to get the benefit of the long forms adopted at present, by employing certain short forms to be provided for them. The differences between these plans will appear as we proceed.

“The first of the two (in this Report distinguished as the Third plan) addresses itself to cases of a simple nature; such as (*e. g.*) a sale by an absolute owner of freehold property to another in fee; an ordinary settlement on marriage; or still more to the usual form of the lease of a dwelling-house; and it appears to us well adapted to facilitate such transactions. It proposes to provide certain short forms of instruments suited to each case, and to enact that the use of any such instrument shall have the same effect between the parties to it, as if an instrument containing certain other specified forms, being the customary forms in the particular case, had been employed. The general character of the provisions by which, we conceive, this plan might be carried out in practice, is so clearly shown in the bill introduced by Lord Campbell in the session of 1843 for lessening the expense attending the transfer of freehold lands of small value, that it appears to us unnecessary to enter into them in detail. We would observe, however, that the peculiar form of conveyance proposed in that bill is no essential part of the scheme; not a property, but an accident of it; and one which, we think, might be advantageously modified, by substituting for the tabular form of conveyance there employed a short deed, such as is to be found in Mr. Humphreys’ work, or indeed such as was adduced by the Lord Chancellor on the occasion of the discussion upon the bill in question. A bill so amended will be found in Appendix, No. I. to this Report. It may be remarked, as an argument in favour of this proposal, that it is, in fact, the full embodiment of suggestions made by more than one gentleman of much professional experience to the real property commissioners; while, so long ago as the 6th of Anne, it formed the principle of an Act (c. 30.) for the registration of deeds in the East Riding of Yorkshire; which, by the 8th G. 2. c. 6., was extended to the other two Ridings of that county. But, as has been already intimated, the plan is not easily susceptible of application to any but simple cases, *i. e.* those where the covenants or declarations contained in the instrument apply to all the parties to it, or at least where no doubt can arise as to the parties to whom they do apply.

“Now in actual business this kind of simplicity occurs less frequently than might at first be supposed. Let us take the case of a sale. One property is mortgaged, and the mortgagee has to join in the conveyance; another is liable to a charge for legacies, and

the concurrence of the legatee is desirable; a third is in trust, and the cestui que trust has to be a party with the trustee in the conveyance; and while the legal estate passes by the act of the latter, the covenants for title are to be entered into by the former. How can set forms of deeds be provided meeting this variety of circumstances, this species of complexity? And yet, it will be observed, that there may be nothing special in these cases; as there is not in those suggested by way of example. The forms employed may be just as much common forms, as the covenants for title, in a deed of sale by one seised in fee-simple, to another and his heirs. But, according to the circumstances of each case, these forms have to be differently put together. The plan of the house may be indefinitely varied, but it is after all only the same kind of rooms differently disposed.

“Nor can it be predicated of the cases just referred to, that they concern only large properties where the expense caused by a deed prepared so as to meet the peculiar circumstances, upon the present plan, may be easily borne. *It is in small properties belonging to persons engaged in business, that complexities of the kind last noticed are perhaps the most likely to occur; and yet these properties, for the very same reason, are those which most frequently change hands; where the burden of long deeds is most heavily felt; and where security against evasion is often the most needed.*

“Now it is to meet this difficulty, that the last of the plans (in this Report distinguished as the Fourth plan) to which we have alluded, peculiarly addresses itself. It aims at giving to the parties concerned in these more complicated cases the same sort of benefit, with nearly the same brevity, as would be attained in cases of a more simple character, by the use of short forms of deeds. And this it proposes to effect by the following method. Let a set of the most approved common forms adapted to all ordinary cases, be selected and arranged under appropriate heads in one column of a schedule to an act of parliament. In another column let there be contained, in the shape of marginal notes to the forms included in the first column, short forms of words, expressive in each case of the substance of the longer form; and let there be an enactment, that whenever a deed, made with reference to the Act, shall contain any covenant, statement, or declaration expressed in the words of any form contained in the first or marginal column of the schedule, or in words substantially to the same effect, the party using that short form shall be taken to have entered into the covenant, or made the declaration contained in the second column, to which the form employed is attached as a marginal note.

“By thus taking to pieces the various parts of which a deed is



composed, it will, we believe, be found possible, in all cases of ordinary occurrence, to enable the parties making the instrument to reconstruct it in such a shape as may suit their circumstances. We shall have attained the first condition necessary for giving to our forms that flexibility, indispensable to render them practically useful, in such cases as those to which we have referred, namely, the power of selection. For thus any party will be at liberty to enter into such of the declarations or covenants embodied into an instrument as may suit his situation, without troubling himself about the rest. The legatee, for example, may join in the conveyance, without covenanting for the title. The trustee may limit his covenants to his own acts and incumbrances. The creditor may release the estate, and do no more, because each will be able to select from the general storehouse those forms only which are fitted to his case, and to confine his engagements to these.

“But the power of selection given by the proposed plan goes beyond this. If the peculiar circumstances of the case require special provisions, such as are not to be found in the forms contained in the schedule, it will be in the power of the parties to introduce these into the instrument; while yet, in the other parts, which may make up perhaps three-fourths of it, they may avail themselves of the short forms provided for them; without danger of introducing into the deed anything inconsistent with the special provisions embodied; and without the necessity of any declaration intended to modify the effect, which the forms employed would have without it.

Here we have a very important principle broached, which, if we are not mistaken, is destined to make a great alteration in the practice of conveyancing. We would gladly give the whole of this report (which appears to us highly creditable to the Society from which it emanated), if we could possibly find room for it. We must content ourselves, therefore, with one more extract, which contrasts the advantages to be derived from the plan recommended, and that of abridging the common forms now in use. It will thus be seen that the plan proposed is highly conservative.

“In an earlier part of this Report we have alluded to a plan, the second of those noticed by us, in which it is proposed to shorten legal instruments by abridging the common forms now in use. And we now again refer to it for the purpose of pointing out what appears to us an important difference between that plan and those with the consideration of which we have been chiefly occupied,—the third and fourth.

“Two advantages would appear to belong to this plan of abridgment: 1st, it would leave the whole contents of any instrument apparent upon its face; 2ndly, the forms promulgated could be used separately, and just so far as the parties pleased, and thus they would possess the same facility of adaptation to the special circumstances of each case, which it is the object of the fourth of the above plans to secure as thereby proposed. But in one particular, and that by no means unimportant, the idea of embodying forms into legal instruments by way of reference, which constitutes the common basis of the third and fourth of the four plans mentioned above, appears to this committee to possess an advantage over any scheme for abbreviating the forms now in use. It is, that short as the instrument actually employed would be, it would be built upon the solid foundation of the existing forms, and would appropriate to itself all that completeness which time and practice have secured to these long-tried bulwarks of property.

*“The present common forms are the result of much thought and long experience, taught frequently by failure, to provide against the subtle distinctions raised by men anxious to escape from inconvenient stipulations, or the doubts produced by judicial criticism as to the meaning and effect of the provisions inserted in different instruments. It is no doubt possible that these forms might, by a skilful hand, be greatly shortened, while their effect remained unimpaired. But if much change were made, is it not to be feared that some valuable defences might be sacrificed unawares? And, at all events, must not a considerable time elapse before men could feel the same confidence in the new forms which they now place in the old? Both the third and fourth plans would also have the great advantage of leaving entirely undisturbed the existing practice of conveyancing. Either of them may be tried as an experiment, to be adopted at the will of the practitioner, and to be construed by itself, with reference only to the act or acts on which it was founded.*

“It should be observed also, that upon the fourth plan mentioned in this Report, the whole of the substantial intentions of the parties would appear upon the instrument, and indeed, to unprofessional eyes, with greater clearness than if the more complete legal expression of it were employed. This Committee, therefore, consider that this last plan is, upon the whole, the best adapted for carrying but the objects contemplated by the reference made to them, and as such they recommend it for adoption.”

But before giving any account of the bills introduced by Lord Brougham in accordance with this Report, we are de-

sirous of giving precedence to a Bill which was introduced by the Lord Chancellor, which must be considered to be in lieu of the Act of the last session of parliament, 7 & 8 Vict. c. 76., intituled "An Act to simplify the Transfer of Property." This Act, already repeatedly noticed in this work, which has, justly or unjustly, managed to obtain a somewhat unhappy celebrity, is now entirely disposed of by the first section of the new Act. This new Act, we know, is the result of the most careful consideration of the subject by several eminent conveyancers; and in presenting it to our readers we have reason to believe that it will stand the test of that rigid examination which its enactments must encounter from the large and intelligent portion of the profession to whose department it more particularly relates. As its provisions are very short, we shall give it entire. This Act we shall call No. 1.

AN ACT TO AMEND THE LAW OF REAL PROPERTY.

BE it enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say,)

1. *So much of 7 & 8 Vict. c. 76. as abolishes Contingent Remainders, repealed as from the commencement, and the residue as from 1st day of October, 1845.*—That so much of an Act passed in the last session of Parliament, intituled, "An Act to simplify the transfer of property," as enacted, that, after the time at which that Act should come into operation, no estate in land should be created by way of contingent remainder; but that every estate which, before that time, would have taken effect as a contingent remainder should take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature, and having the same properties as an executory devise; and that contingent remainders existing under deeds, wills, or instruments, executed or made before the time when that Act should come into operation, should not fail, or be destroyed or barred, merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine, shall be and is hereby repealed, as from the time of the commencement and taking effect thereof; and that the residue of the said Act shall be and is hereby repealed, as from the 1st day of October, 1845.

2. *The immediate Freehold of Corporeal Tenements to lie in Grant as well as in Livery.*— *Stamp Duty on Grants thereof.*— That, after the said 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery; and that every deed which, by force only of this enactment, shall be effectual as a grant, shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release, founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year, would have been chargeable.

3. *Feoffments, Partitions, Exchanges, Leases, Assignments, and Surrenders required (subject to certain Exceptions) to be by Deed.*— That a feoffment, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a partition, and an exchange of any tenements or hereditaments not being copyhold, and a lease, required by law to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said 1st day of October, 1845, shall also be void at law, unless made by deed. Provided always, that the said enactment so far as the same relates to a lease or a surrender, shall not extend to Ireland.

4. *Feoffments not to operate by Wrong, nor Exchanges or Partitions to imply any Condition, or give and grant any Covenant.*— That a feoffment, made after the said 1st day of October, 1845, shall not have any tortious operation, and that an exchange, or a partition of any tenements or hereditaments made by deed, executed after the said 1st day of October, 1845, shall not imply any condition in law; and that the word “give,” or the word “grant,” in a deed executed after the same day, shall not imply any covenant in law, in respect of any tenements or hereditaments, except so far as the word “give,” or the word “grant,” may, by force of any Act of Parliament, imply a covenant.

5. *Strangers may take immediately under an Indenture, and a Deed purporting to be an Indenture shall take effect as such.*— That, under an indenture, executed after the said 1st day of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although

the taker thereof be not named a party to the same indenture; also, that a deed executed after the said 1st day of October, 1845, purporting to be an indenture, shall have the effect of an indenture, although not actually indented.

6. *Contingent and other like Interests, also Rights of Entry, made alienable by Deed, saving Estates in tail; and as regards Married Women enjoining Conformity to 3 & 4 W. 4. c. 74.*—That, after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments in England, of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail; and that every such disposition by a married woman shall be made conformably to the provisions, relative to dispositions by married women, of an Act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled, “An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance;” or in Ireland of [the 4 & 5 W. 4. c. 92.]

7. *Capacity of Married Women to disclaim Estates or Interests by Deed, extended to England.*—That, after the 1st day of October, 1845, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and that every such disclaimer shall be made conformably to the said provisions of the said Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.

8. *Contingent Remainders protected as from 31st December, 1844, against the premature Failure of a preceding Estate.*—That a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and, if created before the passing of this Act, shall be deemed to have been capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened.

9. *When the Reversion on a Lease is gone, the next Estate to be deemed the Reversion.*—That when the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall, after the said 1st day of October, 1845, be surrendered or merge, the estate which shall for the time being confer, as against the tenant under the

same lease, the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

10. *Act not to extend to Scotland.*—That this Act shall not extend to Scotland.

We shall now give some account of the Bills which were introduced by Lord Brougham on the 19th of May in conformity with the recommendations of the Report already alluded to; they seem chiefly founded on the third and fourth plans alluded to in the Report.

His Lordship, after a rapid glance at the results of his first great speech on Law Reform, thus again struck home. Alluding to the Acts passed at the recommendation of the Real Property Commissioners :—

“The consequence of all this was, that the value of property had been increased; the title to it being clearer, the possession more secure, and the expense of maintaining the right to it, or of obtaining the possession of it being lessened materially. Still the transfer of property required to be considered. Nothing could be conceived worse than the principles regulating the conveyance of real estate in this country, whether in fee simple or by lease for years; and yet the free commerce of land was of the utmost importance, as well to the mercantile interest as to the landed, and, above all, to the comfort of the humbler classes. At present in every conveyance there was such an endless prolixity of statement, not only in the parcels, but in preamble, in recitals, in covenants, in provisos, that, in the case of a small estate, the expense became a bar to the sale. This expense was the same in conveying one acre as 1000. It was not merely the parchment, and the writing by the engrosser, but the conveyancer also was to be paid. The longer these deeds were, too, the greater was the risk of error—the chance of a flaw.” pp. 12. 13.

The two Bills introduced which related to this subject were a Bill to facilitate conveyances, and a Bill to facilitate certain leases. The first proposes to substitute the form contained in the first schedule for that now usually adopted. It is as follows: we may call it *An Act*, because we have reason to believe that before our readers see this, it will have passed in the precise shape in which we give it. We shall therefore call it No. 2.

AN ACT TO FACILITATE THE CONVEYANCE OF REAL PROPERTY.

1. *Where words of Column I. of Second Schedule employed, Deed to have same Effect as if Words in Column II. were inserted.*

—Whereas it is expedient to facilitate the Sale and Conveyance of Real Property, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that whenever any party to any deed, made according to the forms set forth in the First Schedule to this Act, or to any other deed which shall be expressed to be made in pursuance of this Act, or referring thereto, shall employ in any such deed respectively any of the forms of words contained in Column I. of the Second Schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if such party had inserted in such deed the form of words contained in Column II. of the same Schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but it shall not be necessary in any such deed to insert any such number.

2. *Deed to include all Houses, &c., and the Reversion and all the Estate.*—That every such deed, unless any exception be specially made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised, belonging, or in anywise appertaining, or with the same demised, held, used, occupied, and enjoyed, or taken or known as part or parcel thereof, and also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances.

3. *Stamp Duty.*—That every such deed under this Act shall be chargeable with the stamp duty with which the same would have been chargeable in case it had been a release founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable.

4. *Remuneration for Deed under the Act not to be by length only.* — That in taxing any bill for preparing and executing any deed under this Act, it shall be lawful for the taxing officer, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider, not the length of such deed, but only the skill and labour employed, and responsibility incurred in the preparation thereof.

5. *Deed failing to take Effect by this Act to be as valid as if Act not made.* — That any deed or part of a deed which shall fail to take effect by virtue of this Act, shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made.

6. *Construction Clause*—That in the construction and for the purposes of this Act and the Schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word “Lands” shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share therein respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing, and the converse; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word “party” shall mean and include any body politic, or corporate, or collegiate, as well as an individual.

7. *Schedules, &c., to form part of Act.* — That the Schedules, and the directions and forms therein contained, shall be deemed and taken to be parts of this Act.

8. *Commencement of Act.* — That the Act shall commence and take effect from and after the first day of October next.

9. *Not to extend to Scotland.* — That this Act shall not extend to Scotland.

#### SCHEDULES TO WHICH THIS ACT REFERS.

##### *The First Schedule.*

This indenture, made the                      day of                      One thousand eight hundred and forty [*or other year*] in pursuance of an Act to facilitate the conveyance of real property, between [*here insert names of parties and recitals, if any*], Witnesseth, that in consideration of                      sterling now paid by the said [*grantee*] [*or grantees*] to the said [*grantor*] [*or grantors*] (the receipt whereof is hereby by him [*or them*] acknowledged), he [*or they*] the said [*grantor*] [*or grantors*] Doth [*or Do*] Grant unto the



said [grantee] [or grantees], his or their heirs and assigns for ever, All, &c. [the parcels.] [Here insert covenants or any other provisions.] In witness whereof the said parties hereto have hereunto set their hands and seals.

*The Second Schedule.*

DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

1. Parties who use any of the forms in the first column of this Schedule may substitute for the words "covenantor" or "covenantee," or "releasor" or "releasee," any name or names; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or other express qualifications thereof, respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Such parties may add the name or other designation of any person or persons, or class or classes of persons, or any other words at the end of form 2. of the first column, so as thereby to extend the words thereof to the acts of any additional person or persons, or class or classes of persons, or of all persons whomsoever; and in every such case the covenants 2, 3, and 4, or such of them as shall be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons, so named.

COLUMN I.

1. The said [covenantor] covenants with said [covenantee].

2. That he has the right to convey the said lands to the said [covenantee] notwithstanding any act of the said [covenantor].

COLUMN II.

1. And the said covenantor doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said covenantee, his heirs and assigns, in manner following; (that is to say),

2. That for and notwithstanding any act, deed, matter, or thing by the said covenantor done, executed, committed, or knowingly or wilfully permitted or suffered, to the contrary, he the said covenantor now

## COLUMN I.

3. And that the said [covenantee] shall have quiet possession of the said lands.

4. Free from all incumbrances.

## COLUMN II.

hath in himself good right, full power, and absolute authority to convey the said lands and other the premises hereby conveyed, or intended so to be, with their and every of their appurtenances, unto the said covenantee, in manner aforesaid, and according to the true intent of these presents.

3. And that it shall be lawful for the said covenantee, his heirs and assigns, from time to time and at all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possess, and enjoy the said lands and premises hereby conveyed, or intended so to be, with their and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of, from, or by him the said covenantor or his heirs, or any person claiming or to claim by, from, under or in trust for him, them, or any of them.

4. And that free and clear, and freely and absolutely acquitted, exonerated, and for ever discharged, or otherwise, by the said covenantor or his heirs, well and sufficiently saved, kept harmless, and indemnified of, from, and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust, entail, will, statute, recognizance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble, and incumbrance whatsoever, made, executed, occasioned, or suffered by the said covenantor, or his heirs, or by any person claiming or to claim by,

COLUMN I.

5. And the said [covenantor] covenants with the said [covenantee] that he will execute such further assurances of the said lands as may be requisite.

COLUMN II.

from, under, or in trust for him, them, or any of them.

5. And the said covenantor doth hereby, for himself, his heirs, executors, and administrators, covenant and promise and agree with and to the said covenantee, his heirs and assigns, that he, the said covenantor, his heirs, executors, or administrators, and all and every other person whosoever having or claiming, or who shall or may hereafter have or claim, any estate, right, title, or interest whatsoever, either at law or in equity, in, to, or out of the said lands and premises hereby conveyed, or intended so to be, or any of them, or any part thereof, by, from, under, or in trust for him, them, or any of them, shall and will from time to time and at all times hereafter, upon every reasonable request, and at the costs and charges of the said covenantee, his heirs or assigns, make, do, execute, or cause to be made, done, or executed, all such further and other lawful acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the better, more perfectly and absolutely conveying and assuring the said lands and premises hereby conveyed, or intended so to be, and every part thereof, with their appurtenances, unto the said covenantee, his heirs and assigns in manner aforesaid, as by the said covenantee, his heirs and assigns, his or their counsel in the law, shall be reasonably devised, advised, or required, so as no such further assurances contain or imply any further or other covenant or warranty than against the acts and deeds of the person who shall be required to make or execute the same, and his heirs, executors,

## COLUMN I.

6. And the said [covenantor] covenants with the said [covenantee] that he will produce the title-deeds enumerated hereunder, and allow copies to be made of them at the expense of the said [covenantee.]

## COLUMN II.

or administrators only, and so as no person who shall be required to make or execute such assurances shall be compellable for the making or executing thereof to go or travel from his usual place of abode.

6. And the said covenantor doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said covenantee, his heirs and assigns, that the said covenantor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request, costs, and charges of the said covenantee, his heirs or assigns, or his or their attorney, solicitor, agent or counsel, at any trial or hearing in any action or suit at law or in equity or other judicature, or otherwise, as occasion shall require, produce all and every or any deed, instrument, or writing hereunder written, for the manifestation, defence, and support of the estate, title, and possession of the said covenantee, his heirs or assigns, in or to the said lands and premises hereby conveyed, or intended so to be, and at the like request, costs, and charges, shall and will make and deliver, or cause to be made and delivered true and attested or other copies or abstracts of the same deeds, instruments, and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said covenantee, his heirs and assigns, or such person as he or they shall for that purpose direct and appoint.

COLUMN I.

7. And the said [covenantor] covenants with the said [covenantee] that he has done no act to incumber the said lands.

8. And the said [releasor] releases to the said [releasee] all his claims upon the said lands.

COLUMN II.

7. And the said covenantor, for himself, his heirs, executors and administrators, doth hereby covenant, promise, and agree with and to the said covenantee, his heirs and assigns, that he hath not at any time heretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands and premises hereby conveyed, or intended so to be, or any part or parcel thereof, are, is, or shall or may be in anywise impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever.

8. And the said releasor hath remised, released, and for ever quitted claim, and by these presents doth remise, release, and for ever quit claim unto the said releasee, his heirs and assigns, all and all manner of right, title, interest, claim, and demand whatsoever, both at law and in equity, into and out of the said lands and premises hereby granted, or intended so to be, and every part and parcel thereof, so as that neither he nor his heirs, executors, administrators, or assigns, shall, nor may at any time hereafter, have, claim, pretend to, challenge, or demand the said lands and premises, or any part thereof, in any manner howsoever; but the said releasee, his heirs and assigns, and the same lands and premises, shall from henceforth for ever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said releasor might or could have upon him in respect of the said lands or upon the said lands.

The Act for facilitating leases is constructed on a similar principle, and it has only this additional advantage, that as leases are usually of a much more simple and uniform character than purchase deeds, so the benefits of this Bill will be of a more extensive character; and there seems no reason to suppose that the plan cannot be extended with peculiar advantage to settlements both of real and personal estate, and to mortgage deeds, and indeed to the whole of that part of the present system of conveyancing, which is known by the general name of "Common Forms." Here is No. 3.

AN ACT TO FACILITATE THE GRANTING OF CERTAIN LEASES.

1. *Persons may use Forms in First Schedule.*—2. *Forms in Second Schedule may be added, &c.*—3. *Where words of Column I. of Second Schedule employed, Deed to have same Effect as if Words of Column II. were inserted.*—Whereas it is expedient to facilitate the leasing of lands and tenements, be it enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this parliament assembled, and by the authority of the same, that whenever any party to any deed made according to the forms set forth in the First Schedule to this Act, or to any other deed which shall be expressed to be made in pursuance of this Act, shall employ in such deed respectively any of the forms of words contained in Column I. of the Second Schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect and be construed as if such party had inserted in such deed the form of words contained in Column II. of the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but it shall not be necessary in any such deed to insert any such number.

4. *Deed to be valid without indenting or sealing.*—Such parties may introduce into or annex to any of the forms in the First Column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the Second Column.

5. *Deed to include all Houses, &c.*—That every such deed, unless any exception be specially made therein, shall be held and construed to include all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, com-

modities, emoluments, hereditaments, and appurtenances whatsoever, to the lands and tenements therein comprised belonging or in anywise appertaining.

6. *Remuneration for Deed under the Act not to be by Length only.*—That in taxing any bill for preparing and executing any deed under this Act, it shall be lawful for the taxing officer and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider, not the length of such deed, but only the skill and labour employed, and responsibility incurred in the preparation thereof.

7. *Deed failing to take Effect by this Act, to be as valid as if Act not made.* — That any deed or part of a deed which shall fail to take effect by virtue of this Act shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made.

8. *Construction Clause.*— That in the construction and for the purposes of this Act, and the schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word “lands” shall extend to all tenements and hereditaments of freehold tenure, and to such customary lands as will pass by deed or deed and surrender, and not by surrender alone, or any undivided part or share therein respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing and the converse; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word “party” shall mean and include any body politic or corporate or collegiate, as well as an individual.

9. *Schedules, &c. part of Act.*—That the schedules, and the directions and forms therein contained, shall be deemed and taken to be parts of this Act.

10. That this Act shall commence and take effect from and after the first day of October next.

**11. That this Act shall not extend to Scotland.**

### SCHEDULES TO WHICH THIS ACT REFERS.

*The First Schedule.*

This Indenture, made the \_\_\_\_\_ day of \_\_\_\_\_ One thousand eight hundred and forty \_\_\_\_\_ [or other year], in pursuance of an Act to facilitate the granting of certain leases, between [here insert the names of the parties, and recitals, if any], Witnesseth, that the said [lessor] [or lessors] doth [or do] demise unto the said [lessee] [or lessees], his [or their] executors, admi-

nistrators, and assigns, all, &c. [*parcels*], from the \_\_\_\_\_ day  
 of \_\_\_\_\_ for the term of \_\_\_\_\_ thence ensuing,  
 yielding therefore during the said term the rent of [*state the rent  
 and mode of payment*].

In witness whereof the said parties hereto have hereunto set  
 their hands and seals.

### *The Second Schedule.*

#### DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

1. Parties who use any of the forms in the first column of this Schedule, may substitute for the words "lessee" or "lessor" any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may fill up the blank spaces left in the forms 4 and 5, in the first column of this schedule so employed by them, with any words or figures, and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.

5. Where the premises demised shall be of freehold tenure, the covenants 1 to 10 shall be taken to be made with, and the proviso 11 to apply to, the heirs and assigns of the lessor; and where the premises demised shall be of leasehold tenure, the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators, and assigns.

#### COLUMN I.

1. That the said [lessee] covenants with the said [lessor] to pay rent;

#### COLUMN II.

1. And the said lessee doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor that he, the said lessee, his executors, his administrators, and assigns, will during the said term pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.



COLUMN I.

2. and to pay taxes ;

3. and to repair ;

4. and to paint outside every                      year ;

5. and to paint and paper inside every year ;

COLUMN II.

2. And also will pay all taxes, rates, duties, and assessments whatsoever, whether parochial, parliamentary, or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor, on account thereof, excepting land-tax ; and excepting in Ireland tithe rent-charge, and such portion of the poor-rate as the lessor is or may be liable to pay, and excepting also all taxes, rates, duties, and assessments whatsoever, or any portion thereof, which the lessee is or may be by law exempted from.

3. And also will during the said term well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things which at any time during the said term shall be erected and made, when, where, and so often as need shall be.

4. And also that the said lessee, his executors, administrators, and assigns, will in every                      year in the said term paint all the outside wood-work and iron-work belonging to the said premises with two coats of proper oil colours, in a workmanlike manner.

5. And also that the said lessee, his executors, administrators, and assigns, will in every                      year paint the inside wood, iron, and other works now or usually painted with two coats of proper oil colours, in a workmanlike

## COLUMN I.

6. and to insure from fire in the joint names of the said [lessor] and the said [lessee] ;

to show receipts ;

and to rebuild in case of fire.

7. And that the said [lessor] may enter and view state of repair, and that the said [lessee] will repair according to notice.

## COLUMN II.

manner ; and also re-paper with paper of a quality as at present, such parts of the premises as are now papered ; and also wash, stop, whiten, or colour such parts of the said premises as are now plastered.

6. And also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised to the full value thereof, in some respectable insurance office, in the joint names of the said lessor, his executors, administrators, and assigns, and the said lessee, his executors, administrators, or assigns, and keep the same so insured during the said term ; and will, upon the request of the said lessor, or his agent, show the receipt for the last premium paid for such insurance for every current year ; and as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sums or sum of money which shall be recovered or received by the said lessee, his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire as aforesaid.

7. And it is hereby agreed, that it shall be lawful for the said lessor and his agents, at all seasonable times during the said term, to enter the said demised premises to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises ; and further, that all wants of reparation which upon such views shall be found, and for the amendment of which notice in writing

## COLUMN I.

8. That the said [lessee] will not use premises as a shop.

9. And will not assign without leave.

10. And that he will leave premises in good repair.

## COLUMN II.

shall be left at the premises, the said lessee, his executors, administrators, and assigns, will, within three calendar months next and after every such notice, well and sufficiently repair and make good accordingly.

8. And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises or any part thereof into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose, or otherwise than as a private dwelling-house, without the consent in writing of the said lessor.

9. And also that the said [lessee] shall not nor will during the said term assign, transfer, or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent in writing of the said [lessor], his executors, administrators, or assigns, first had and obtained.

10. And further, that the said [lessee] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear, and damage by fire, only excepted.

## COLUMN I.

11. Proviso for re-entry by the said lessor on non-payment of rent, or non-performance of covenants.

12. The said [lessor] covenants with the said [lessee] for quiet enjoyment.

## COLUMN II.

11. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, and assigns, then and in either of such cases it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy as of his or their former estate, any thing hereinafter contained to the contrary notwithstanding.

12. And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

We have devoted this large space to the provisions of these Acts, as without them we think our readers will not be able to see the great advantages of which the proposed plan is susceptible. The first of these is, that it is not compulsory. It is purely optional; and we cannot doubt that when the learning, experience, and good sense

of the profession have been turned in this direction, these Acts will be found to be of great service in practice. The main question is now—is the principle on which the Acts No. 2. and No. 3. are framed a right one? Can the benefit of the common forms be obtained in the manner proposed? We answer these questions most gladly in the affirmative. We have here the germ of a most valuable discovery, which will save incalculable labour and expense in the transfer of property, and which will preserve the existing rules of law, and even the existing practice, so far as it can or ought to be preserved. What then is the disadvantage of the scheme? One, and only one, rises almost immediately to the mind. How will it affect the profits of the profession? We answer boldly that we have no alarm on this head. If these were endangered it would be no legitimate objection to the plan; but we firmly believe that when once put in practice the profession will have no reason to regret the change on this score. The Acts provide for this point by ss. 4. & 6.

That in taxing any bill for preparing and executing any deed under this Act, it shall be lawful for the taxing officer, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider, not the length of such deed, but only the skill and labour employed, and responsibility incurred in the preparation thereof.

Here, again, an invaluable principle is introduced; the axe is laid at the root of a mass of evil, and we have no fear as to the results. It will be our duty, however, carefully to watch the change here to be commenced.

We wish indeed not to be misunderstood in this important matter. We are not going to undertake any warfare against the fair profits of the profession. We think it is necessary for the public interest to support the present station of the profession in this country. The duties entrusted to it are the most important that can be discharged by man; and it is absolutely necessary to secure and attract men of the first ability to discharge them. This can only be done by the State offering the highest rewards that it can give—rank, station, wealth, and power. But while all this is quite obvious, we must also declare it to be our opinion, that the State will fail in securing the best abilities if it makes mere pecuniary gain

the sole object of attention. Some more generous impulses must be excited.

It is our duty to render the science of the law as cheap and as simple as we can. But, alas for human wit! amend as we will, simplify as we will, cheapen as we will, the science of the law, in every civilised country, but more especially in England, must always be difficult, and its practice must be expensive. We have no fear, we repeat, as to the profits of the profession; on the contrary, we firmly believe that we are increasing those very profits when we cheapen and simplify, and that so it will turn out. But be this as it may, we must persevere in our endeavours. We are prepared to meet some temporary obloquy, and some temporary loss; but we believe that we have the great majority even of the profession with us in this matter. More especially we are desirous of silencing, if possible, the vulgar error, that solicitors are opposed to every amendment of the law, and are keeping up all its abuses that they may profit by them. We do not believe that there is any ground for the charge. Unworthy exceptions will of course exist; but that it applies to the great bulk of that branch of the profession, we do not believe. Solicitors wish to pursue their profession, or, to use plain language, to gain their bread, honourably, not to say honestly. We can find no evidence of any contrary feeling. These bills, which are said to affect the profits of the profession, have been permitted to pass without one petition against them, without one voice having been lifted up to oppose them. What authority, then, is there for this false and idle cry? We did, indeed, hear, just before this work was started, of some projected Lawyers League against the public. Where is it now? Such an association would fall to pieces in one little month; and they who joined it would do so, we are persuaded, not only to the injury of the cause they professed to serve, but to their own certain ruin; for the public is a little too shrewd to employ men who are openly banded together against them. Away, then, for ever with such idle fears and inventions!

But as we have in this instance not hesitated to advise a reform of the law, even though it may interfere with fees; so we shall quite as willingly turn our attention to some professional services which are now inadequately paid; and endeavour to relieve the profession from some burthens which improperly press on it; and this we shall now be able to do with much more effect. We may already notice the Documentary Evidence Act, and in some respects, the Act for abolishing Outstanding Terms, as Acts passed this session, which will materially save the pocket of the client without reducing the fees of the practitioner. We need not

expatiate on the beneficial consequences of changes of this nature.

We are disposed, on the whole, to treat these three Acts as the commencement of an important change in the practice of conveyancing. We shall have many future opportunities of returning to any real difficulties which may be felt in their construction. At present we do not think it to be our duty to attempt to show our learning and ingenuity by picking holes in any of them. This is, after all, a poor exhibition. The legislature has now declared its intention to shorten and simplify deeds, and it is the duty of the profession to carry out that intention.

We have also thought it right to lose no time in placing these Acts, even before they have received the Royal assent, *verbatim*, before our readers; and this wish has been facilitated by the kindness of their promoters in both Houses of Parliament. They all come into operation from and after the 1st of October, and it will be important for those practically concerned in the transfer of property fully to consider their operation by that time. The profession, as to this, is fully competent to judge for itself. We will merely submit one or two first impressions that occur to us.

By Act No. 1. s. 2. all corporeal hereditaments will lie in grant as well as in livery: this will establish one uniform deed, which is to be stamped as a lease and release. The word "grant," which by s. 4. is not to imply a covenant, will be amply sufficient as an operative word. This deed should commence in the old form, *This Indenture*. It will be seen that the form in the First Schedule to Act No. 2. is prepared accordingly; and if this be adopted, or any other deed *made in pursuance of the Act, or referring thereto* (s. 1.), the benefit of the Act No. 2. may be obtained, which is chiefly, that if the words in the First Column of the Second Schedule are used, the words in the Second Column will be implied. This will no doubt at first appear strange to the profession, and there may be a reluctance to adopt; but a little time and reflection will, we think, soon overcome all difficulties, and the forms will speedily come into familiar use. Special clauses will of course still be necessary, and be inserted, as before; but the practitioner will soon see how advantageous it is to have the power of getting the benefit of old and established forms without detailing them in every deed; this will, in many cases, enable him to use his space for any special matter; it will lessen the chance of error and mistake; and, in many cases, it will give a material saving in stamp duty.

Before concluding this article (which has already exceeded its intended limits), it is only an act of bare justice to notice

the obligations which Lord Brougham has again conferred on the great cause of the amendment of the law.

If we consider his Lordship's speech on the 7th of February, 1828, in bringing forward his celebrated motion for an address to the Crown for a commission to inquire into the defects in the laws, and into the measures necessary for removing them, it will be admitted that this speech was never surpassed in the importance of the matters which it brought before Parliament, or in the manner in which they were introduced. The leader of a great party, a powerful opposition, flushed with recent triumph, and pursuing under his guidance that course which soon after opened to them the gates of power, with a name at once endeared to the people and respected by the chiefs of his own party—a leading advocate, moreover, in great practice at the bar, urging on the reform of the law, regardless of any sacrifices that he might thus make:—these are only some of the considerations which are calculated to render this work one of the greatest ever accomplished. For it was not only a great and eloquent speech to be heard, read, and admired: its practical effects were far more important. It formed an era in the history of the law: more than any thing else, it paved the way of his party to office; it fixed the Whigs, at any rate for a time, in the hearts of the people of England. It was altogether a grand spectacle, to see great influence used for such purposes, and the righteous cause of the amendment of the law preferred to all others by “the renowned Emir”<sup>1</sup> of the opposition.

After seventeen years' interval we find a second great effort made in the same cause, that interval having been filled up by no mean list of performances; but the distinction between the speech of the 19th of May and all intermediate addresses is, that it is a general statement of the whole matter. We believe the subjects of this second speech to be not inferior in importance to those of the first, and it will be seen that so far they have been attended with the same success.

Neither, as to the bills to which we have been adverting, should we in fairness withhold their meed of praise to others. We have particular gratification in noticing the conduct of the Lord Chancellor as to them; he gave them throughout a

<sup>1</sup> Lord Dudley's Letters, p. 272.



fair and candid support. A word from him would have stopped them in any of their stages; that word, however, was never spoken, and he has thus, in our opinion, given another instance of that true greatness which will long distinguish his name.

And this brings us to the present position of these Bills. At the time at which we write, the Bills No. 1. and No. 3. await the Royal assent; and No. 2. has passed all but its last stage. We are therefore justified in considering them as law. They passed the House of Lords, having been there much considered by that illustrious phalanx of lawyers who now adorn that House. They have passed without one dissentient opinion having been expressed; they have also received the approbation of a large portion of the conveyancing branch of the profession. Under these circumstances, we have an earnest conviction that they will be received with fairness and candour. We are glad to see that the principle of these Bills has been recognised by the present ministry, in the Bill relating to Leases in Ireland, of which notice was given by Lord Devon, and which, as we understand, is to be prepared according to the principle of Lord Brougham's Bills; and we are bound to give them this further credit, that no revenue objection was thrown in their way—in our opinion, a resolve as wise as it was liberal.

We must not conclude this article without observing that another important Act, in connection with the above, is on the eve of passing—the “Act to render the Assignment of Terms unnecessary;” but as this does not come into operation until 1846, we shall have time to devote an article to its consideration in our next Number.

## ART. XII.—SIR WILLIAM FOLLETT.

A GREAT light of our legal firmament has unhappily gone out, and the event seems to impose upon us the duty of recording its splendour and tracing its course while it continued to shine forth.

Sir William Follett was among the most able and most successful members of the profession; and he united, with an extraordinary capacity for its prosecution, talents of a very high order as a senator;—talents rarely found in combination with those of the lawyer, how closely soever the two provinces may, to superficial observers, appear to touch. In truth, if there is much to qualify an able and popular advocate for parliamentary exertion, there is also much to disable him. The niceties of legal arguments are not very level to the comprehension of the multitude, either within or without the walls of the Senate, and the subtle argumentation in which lawyers are prone to indulge is therefore very little suited to the popular taste. An advocate, too, representing his client is apt to be somewhat careless how sorely he fatigues the judge, in urging all points that may by any possibility serve his cause. Even when he addresses a jury, he makes sure of their attention, for they have no choice, because they are sworn to determine, and must therefore hear; besides that, only coming now and then into the box, they are much more patient than men who are doomed daily to hear debate. He is also a good deal above his audience in understanding, generally their superior in station,—and thus it happens that the advocate, always secure of a hearing, takes little pains to gain attention, nor at all dreads losing it by his prolixity. Add to this, that he generally enters the House of Commons after his station is established in Westminster Hall, and he is not disposed to court favour in order to set his new position on a line with that which he has already attained. All these considerations tend to make lawyers somewhat careless both of being interesting and of being

brief, when they address the House; and all of these considerations are apt to make them abandon the attempt at rising there, in some disgust at finding themselves undervalued or overlooked. These astute personages find the meed of popular applause vain and idle, and run back to the chase of surer game, among their natural prey. The failure of lawyers in Parliament is thus not difficult to account for. But nothing can surpass the gross ignorance of some who on the present occasion have handled this subject. It has actually been said by some one of a class manifestly wholly unacquainted with both the Bar and the Senate, that only two exceptions have been known of men succeeding in Parliament after establishing their reputation at the bar; as if Sir Samuel Romilly were no lawyer; as if Lord Lyndhurst and Lord Brougham had never been known as leaders of the bar; as if Lord Plunket had not held the very first place in both courts and parliaments; as if Lord Denman had failed either in the one scene or the other. The list might be lengthened by going back to the Dunnings, the Thurlows, the Lees, the Wedderburns, the Floods, the Murrays; but the thoughtless writers we allude to, of course are still more ignorant of the times before their own, than of the most universally known facts of the present day. We, however, admit the general rule to be the other way, and that Sir William Follett is to be mentioned only as augmenting by one remarkable instance the considerable number of the exceptions. This is calculated to lend his history an additional interest, an interest not confined to the circle of professional men.

He was the son of Captain Follett, by Miss Webb, an Irish lady of Kinsale. In 1790, the health of this gallant officer having been broken by serving in the West Indies, he left the army, and engaged in mercantile pursuits in Devonshire, where he lived, and where he died in his seventy-first year. William was then the eldest surviving son, having been born the 2d December, 1798, at Topsham. His elder brother, a lieutenant in the 43d regiment, was killed before San Sebastian, in September, 1813, on the very day after he landed in Spain.

William, contrary to the positive, but most gratuitous assertion of other periodical writers, had no constitutional weakness in early life, and no want of the very earliest indications of great talents. His own family had formed the highest opinion of his capacity, and in consequence educated him for the bar. He was first sent to the Exeter Grammar School, then under Dr. Lempriere, author of the well-known classical dictionary; and he was afterwards placed under the private tuition of Mr. Hutchinson, curate of Heavitree, near the same city. In 1814 he went to Trinity College, Cambridge, where he remained till 1818, when he took his bachelor's degree, but he took it with no academical honours, nor did the sciences chiefly cultivated there ever prove attractive to him; though he was sufficiently conversant with classical literature, and his general reading was extensive. It has been said by the same inaccurate dealers in ephemeral history, that at Cambridge he was a whig. This rests upon insufficient authority, at least it is coupled with a very gross mis-statement,—for the writer says that on meeting a college friend soon after he entered Parliament, he said, in answer to a charge of having changed his principles, that his conversion was at least disinterested, the whigs being then in the zenith of power and popularity. Now, here is an anachronism of some years, for he entered Parliament in 1835, when the whigs were in opposition, and he entered it as Solicitor-General. He had three years before contested Exeter on tory principles, and failed; and the fact is certain that from the moment of his coming to London in 1818 he was, and continued steadily to be, a tory or conservative; all his friendships, and most of his connections, being with that party. Another equally groundless mis-statement accompanies the same assertion: it is said to be well known that overtures were made to him by the whig government, and rejected. We affirm, upon the most unquestionable authority, that for this there is not the least foundation. We state this as well upon the express authority of the whig ministers as upon that of Sir William Follett's family, and his most intimate friends. The Chancellor (Lord Brougham) offered him a silk gown in 1831, having known him intimately at the bar, and formed very

early a high estimate of his talents; but the offer was expressly made upon the footing of his being a political adversary, and certain to take an active and a powerful position against the government of his lordship's friends in the House of Commons. The refusal of professional rank was made after full deliberation, both in conference with the Chancellor and with Sir William's near connection and attached friend Mr. Croker, and it was refused solely upon the ground of professional prudence.

In 1818 he became a pupil of Mr. Godfrey Sykes, and afterwards of Mr. Robert Bayly, then eminent special pleaders, having been two years before entered of the Inner Temple, and after very diligent and successful study for three years under these learned men, he began himself to practise as a pleader below the bar, and obtained a fair share of business. In the summer of 1824 he was called to the bar, and the year after joined the Western Circuit, to which also his master, Mr. Bayly, belonged. He was now in his twenty-seventh year, and it may safely be affirmed that very few men have ever entered the profession with more abundant qualifications for rapidly and greatly succeeding in its arduous rivalry. His understanding was naturally penetrating, and it was solid, so that with extraordinary quickness of perception he had a sound and mature judgment, never at fault. At the happy age, especially, when all the active powers are in full vigour, and lend force and quickness to the intellectual faculties, other men may be found of equal acuteness, of equal subtlety, of equally rapid apprehension, but in combination with such sure and accurate judgment, that capacity has rarely if ever been found. As genius is of universal application, we must suppose that had the accidents of position or of taste directed his studies to the severer sciences, his successful prosecution of those studies would have been as remarkable. But still his legal studies had never suffered any such interruption, and as the law is a jealous mistress, nor easily pardons even any passing infidelity, never any divided affection, it was among the favourable circumstances in which he entered the forum, that his mind had been wholly given to jurisprudence, and was entirely filled with the solid fruits of many years' study.

Accordingly his rise was rapid. The very first time that he addressed the Court of King's Bench, every one who heard him was struck with the excellence of his argument, both in the matter and in the manner, nor entertained the least doubt that the greatest success was his certain portion: his confidence too was unhesitating, unfaltering, because it was founded on a ground which he felt to be solid: but his outward manner made no unbecoming disclosure of this feeling, and was firm, without being presumptuous. But his entire confidence in his own opinion was not even at his first entrance upon the duties of the profession to be shaken by the contrary decision of the judges themselves, and some who sat next him in court, when they determined in opposition to his first argument, well remember his saying in an audible whisper, addressed to himself, "They are going to decide quite wrong — as wrong as it is possible for men to decide." This made full as great an impression on those who heard or rather overheard it, as the able argument itself which he had just delivered. The judges whom he thus judged were not inferior men; they were the very first in the profession,—Abbott, Bayley, Holroyd, and Littledale. The friend, as he afterwards became, who heard him, said, "that whether he or the court was right, he would ensure Follett a thousand a-year." This anecdote Sir W. Follett was fond of repeating.

The rapid success of one so singularly gifted, and devoting himself so exclusively to his profession, was little to be wondered at, but to all admirers of talent, was greatly to be rejoiced in; for, as there is nothing so painful to the generous mind as the sight occasionally exhibited of merit deprived, by accident, of its just distinction, and men of known capacity pining in obscurity, so is there no spectacle more pleasing to contemplate than that of genius reaping without any delay, almost without a struggle, its appropriate reward. To say that Sir William Follett presented himself at the first as fully fitted for his professional duties as he ever after appeared, might perhaps savour of exaggerated admiration; and he certainly derived from practice the improvement which it must always afford, and most to those who from natural ability may seem the least to need it. Yet no one can doubt that in this, as in some other respects, he strongly resembled Mr. Pitt, for

there was greater maturity displayed, both of faculties, of acquirements, of legal habits, almost of an advocate's habits, in the young lawyer on his very first appearance, than had ever before been seen in Westminster Hall; as the statesman is well known to have started into public life at a still earlier age an accomplished orator, whose after exhibitions could hardly be said to have surpassed his first display. There is, indeed, this marked diversity between the two cases,—that Follett was an accomplished jurisconsult as well as a highly-gifted speaker, and accomplished from the beginning; while Pitt's rhetoric so far exceeded his statesmanship from first to last, that it left the latter far behind during all his long life of power nearly uncontrolled.

The practice of Sir William Follett soon became very extensive, both in London and on the circuit.<sup>1</sup> He was the favourite junior in all causes, whether important or trifling. He gave the most entire satisfaction, because the most valuable and unobtrusive assistance to his leaders. His business was not confined to the courts of law, for he was eagerly sought after as counsel in parliamentary committees; and he afforded perhaps the solitary instance of a great *Nisi Prius* practitioner, and one full of practice in Banc, gaining also an ample income from parliamentary business, without in the least suffering it to interfere with the regular duties of his profession either on circuit or in Westminster Hall. It is well known that they who devote themselves to that most lucrative line of the profession give up the more exalted and thorny for the humbler and more gainful path; and that he who would line his purse by treading in the one, must not aspire to the honours which are only to be approached by the other.

In committees he first became distinguished as a leader before his standing at the bar had placed him in the front rank; and in all probability that committee practice was of service in making his powers of command known; for it is certain that a lawyer may be highly qualified to fill and to shine in the second place, according to the well-known French

<sup>1</sup> The best test of his success was the rapid annual increase of his fees: they amounted, as we have heard it confidently stated, to 300 guineas in the first year; and in the fourth year they reached nearly 3000. This was a success, we conceive, wholly without example in the profession.

proverb<sup>1</sup>, who would be eclipsed in the first, of which the most eminent pleaders, the Wallaces, the Holroyds, the Richardsons, the Littledales, the Abbots, afford striking instances.

Sir William Follett, when he became a leader, at once fully answered every expectation that had been formed of him. In the first place he was thoroughly master of his profession; that is, of the principal tools wherewithal he had to work. Then the others he could handle as easily and as skilfully, for he had an extraordinary power of speaking with clearness, with perfect self-possession, with abundant energy where energy was required, with a most pleasing tone of voice, that filled the ear, never tired, and perfectly suited the solid matter and the delicate texture of his discourse. Again, he had absolute command over both his temper and his faculties; could make the one submit to his purpose, and use the other at will, in that extraordinary process, without which there is hardly any real and certainly no practical business-like eloquence, the thinking, and reasoning, and refining, and calculating while going on, and, as it were, on his legs. Thus his attention was ever wide awake, and as if his whole soul were concentrated in each cause, and in each successive step of it. His circumspection was also perfect, and served to provide against all attacks as against all snares. From his quickness, as well as his entire self-reliance, and his perfect command of himself, he was of singular prudence and discretion, never to be taken off his guard, nor ever hurried into any proceeding of hazard. The faculty so essential to a leader of causes as of armies, a sudden and piercing glance through the adversary's plans from a rapid view of his movements, the coup d'œil, as it is termed, he possessed, in an eminent degree, like all great advocates who conduct business. If he was not to be over-reached or out-manceuvred by his antagonist, so did that antagonist run no small risk from him. He was a person not to be slumbered near, and also being somewhat apt to press on the vanquished, he was, as Mr. Grattan once said of Lord Clare, though in another sense, "a dangerous man to run away from." The judge, too, required to be as much on his guard as the adverse counsel. No one's arguments in law required to be more closely watched,

<sup>1</sup> Tel brille au second, qui s'éclipse au premier.



more especially in his reply, when the judge was left to himself without any comment or explanation of the opposite party; for so extremely skilful, so dexterous was he, so gradually, by such imperceptible steps, did he glide on, insinuating himself rather than moving, that you could not tell he was making any progress, but suffered him by unseen steps to advance by minute fragments to beg the question, till at last you found yourself entangled in the web so artistly woven and so cunningly thrown around, and had to go back to the part from which the first *petitio principii* had been made.

Ἡστ' ἀράχνια λεπτά, τὰ κ' οὐ κέ τις οὐδὲ ἴδοιτο  
Οὐδὲ θεῶν μακάρων· περὶ γὰρ δολόεντα τέτυκτο.\*— *Od. Θ.*

It happened that during Sir William Follett's time no state prosecutions for libel or for treason, nor indeed any other *causes célèbres*, occurred after he succeeded to the lead. He had not, therefore, any of those comparatively rare opportunities of distinguishing himself before all the world, and his great fame was confined to Westminster Hall until he came into Parliament. It was in 1835 that this important event in his life happened; but far less important to his fame than to that of others, for his reputation being established at the bar was of a kind that left no man the least room for doubting his great success also in the senate, and it is perhaps the only instance in which this could so certainly be foreseen. He was appointed Solicitor-General during Sir Robert Peel's short administration, and was returned for Exeter by a great majority, having three years before been defeated in contesting that city. No sooner did he take his seat than the expectations of all men were amply fulfilled, and the predictions justified of those who had marked his progress at the bar. His matter was seen to be pregnant and pertinent; but it is in manner that lawyers are apt to fail before the assembled commons, and his manner was perfect—calm, yet not cold; firm, but unassuming; perfectly self-possessed, though without the least presumption, every one admitted it to be about the most recommending manner that ever had clothed logical argument, clear statement, and powerful appeal. The voice,

\* "Fine as the Gossamer, which e'en deceives  
The eyes of gods, his cunning web he weaves."

too, was of peculiar sweetness, as well as great compass, and it reminded the hearer of Mr. Pitt, to whom indeed in his whole manner he bore a great resemblance. His resemblance in the early maturity of his faculties and his fame has already been pointed out. He was, moreover, an accomplished debater, which many great speakers never were, including certainly Burke, probably Chatham, undoubtedly Windham, and perhaps Romilly also. The reliance which the government or the party he was connected with reposed on his assistance in every emergency was unbounded, like the confidence of his clients, and it was amply justified. It was a common observation that he was less indifferent than some others to the gains of the profession, but never did he leave the least ground of complaint to his parliamentary allies that he preferred his briefs to his duties in the House of Commons. It is no exaggeration to say that the solidity of his matter, the charms of his manner, and his judicious use of the public ear, "using it as not abusing," made him more certain of a hearing, and more sure to retain it while he pleased than almost any lawyer who ever addressed the House. Besides, his command over their attention was not confined by any wit that sparkled in his speech, the surest remedy for any popular assembly's flagging spirits, nor yet by any lively imagination of which he poured forth the stores, nor by impassioned or pathetic appeals, nor even by any rare power of vehement declamation; but it was derived from a rare combination of most lucid statement, singular aptness of argument, and of homely illustration, a forcible expression of contempt for the adversary or the argument he was exposing mingled with a very sparing but not unhappy use of sarcasm, and by a voice of which it would be difficult to speak too highly, whether its smoothness or its richness or its sweetness be considered. He took part more rarely and more sparingly than all desired he should, fearful of wearying his audience by frequently appearing before them, and long demanding their attention. He was found quite equal to grappling with the largest as with the most ordinary questions; and though moderately provided with political knowledge, he never was deficient in the supply required by the exigency of the occasion, whether the subject of discussion was foreign or domestic policy, economical and finan-

cial science, or the learning of constitutional law ; for he had the happy facility possessed by the *Nisi Prius* advocate, of gaining information for the special emergency — the artist who must make himself acquainted with the machinery of a patent one day, the nature of a chemical process another, the tackle and steerage of a ship a third, that he may explain these matters clearly to a jury as ignorant of them when he begins his lecture as he was himself two days before, and will again be two days after the cause has been tried.

On Sir Robert Peel's second accession to office in 1841 he became again Solicitor-General; and in 1844, on Sir Frederick Pollock being raised to the Exchequer as Chief Baron, he succeeded him as Attorney-General, which office he held till his decease.

As there were no celebrated causes to display his talents at the bar during his time, so were there no cases of very great distinction to make his parliamentary appearance more memorable than their intrinsic merit was calculated to render them. But a mixed case of criminal law and parliamentary exhibition was afforded by the trial of Lord Cardigan, for fighting a duel, and no member of the House of Lords who was present on that occasion will easily forget the immeasurable superiority which, throughout the day's proceeding, he showed over all his competitors in every branch of the cause.

During the last five or six years of his brilliant career, he was a frequent practitioner in Courts of Equity, and he showed a familiar acquaintance with the law of these tribunals, and above all, with the law of real property, which they so often administer, the most recondite, difficult, and scientific branch of our jurisprudence. It is probable that his frequenting the Court of Chancery was mainly owing to his having the prospect before him of one day succeeding to its chair: no one doubts that had he survived, the Great Seal must have been his portion, and with a more than ordinary assent of the whole profession over which he would so worthily have been called to preside.

But the decrees of an All-wise Providence forbade. As early as the summer of 1838, symptoms were perceivable of a serious malady having made a lodgment in his constitution, and it was

feared that his lungs were affected. In 1841, while attending the privy council, he was seized with an attack of erysipelas, which retreated inwards, and alarmingly affected the alimentary canal. He hardly regained good health after that illness. Two years later the spine was supposed to be affected, for he certainly had an extreme feebleness in the lower limbs, almost amounting to paralysis. At length, in 1844, this increased, and seemed complicated with a return of pulmonary weakness. He was obliged to leave off all practice; and on the rising of Parliament, to go abroad with the intention of wintering in the south should his health not be sufficiently restored by the autumnal repose to justify a return in November, the beginning of the judicial year. It was ultimately found necessary to make for Italy before the cold of winter approached, and he went to Rome and Naples, which he did not quit before February. His attached friend Lord Brougham had hopes of his benefiting by the delightful and agreeable climate of Provence, and for some weeks expected him at Cannes, where he had urged him to occupy his villa. He went however by sea to Marseilles, and after passing a few days at Paris, returned to England early in March. The proverbial deceitfulness of consumption, which soon after plainly declared itself, flattered his friends with hope that the blow might be stayed, if not averted, with which they were now threatened. But he felt unequal to any business except that of consultations, and giving opinions, nor could he attend Parliament, except on two or three occasions, on one of which he spoke, and with his accustomed power and felicity. In the month of May, however, finding his illness increase, he distinctly tendered the resignation of his office of Attorney-General, which, however, was not accepted.<sup>1</sup>

For better air he removed from his house in Park Street to the house of a kinsman in the Regent's Park. The disease now made rapid progress; but his mind remained unclouded within a few hours of his decease, which took place at three o'clock in the afternoon of Saturday, the 28th of June, 1845. How far the consumption which proximately caused his

<sup>1</sup> See Letters, *post*, p. 450 — 452.

death was itself the result of another malady it is not easy with certainty to determine. But certainly, although the chest was in 1838 the seat of illness, a tendency to palsy was perceived long before the pulmonary complaint which proved fatal had appeared. That he suffered from severe labour has frequently been said, but without any foundation. The mischief was seated far deeper than any devotedness to hard work could reach, or any relaxation from hard work could cure. In truth, no man ever went through his labour of any kind, whether in chambers or in court, with greater ease to himself. That labour never fatigued his understanding or damped his spirits, and his body suffered accordingly no wear and tear from the work which could only affect it through the mind.

He had married in 1830 the eldest daughter of the late Sir Harding Giffard, Chief Justice of Ceylon, by whom he has left two daughters and four sons, the youngest only thirteen months old.

His death in the zenith of his fame, the fulness of prosperity, the certain prospect of the highest public station under the crown which the country knows, the unimpaired vigour of his great faculties, the possession of universal esteem, such as no successful lawyer but Lord Erskine ever before possessed, an esteem that seemed to lay all envious feelings asleep, as if where there was no rivalry there could be no jealousy, was calculated to produce a great effect upon the minds of all; it was regarded as a singularly affecting spectacle, one which exhibited in a striking way the vanity of sublunary enjoyments, of mortal powers and worldly prospects—it was deeply felt as a public, and above all as a professional loss. The funeral was rendered still more solemn by the spontaneous attendance of the heads of the law, the ministers of state, many distinguished members of both Houses of Parliament, and the most eminent members of the bar. The Chancellor, the Prime Minister, the Chief Justice of the Common Pleas, were among those who bore the pall. The funeral service was rendered impressive by all these extrinsic circumstances, and it was only lamented that its singular and touching beauty should have been in a great degree sacrificed to the

music — admirable music it is true, but a most inadequate substitution for the noble and mournful simplicity of the service, as it is read, and ought ever so to be. A subscription has been formed for erecting a statue to his memory.

In relating the history of this eminent person's life the best description of his character has been presented to the reader. It remains only to say that he was peculiarly amiable in all the relations of domestic and of private life. To this the sweetness of his equable temper, and the known purity, as well as firmness, of his principles contributed with a certainty and a power that must needs have produced their natural effect. His genius having always been directed towards law, and law alone, his general information was not extensive, and he disappointed all who expected from his conversation the same pleasure that they derived from his public exhibitions. But he loved the relaxation of society, and took his part with sense, and intelligence, and uniform good humour, though all desired it should be a larger share. His composition was clear and pure, though he had only the habits of writing acquired by professional correspondence or opinions. Though law was the study of his life, he was well versed in classical literature, and retained to the last his relish for its study. Indeed, his taste in speaking was pure enough to show that he drew his principles of oratory from the only pure sources. In Italy he enjoyed the pleasure of such associations as much as the state of his enfeebled health would allow. That he was a competent Greek scholar has been doubted from the occurrence at Guildhall of a book being mentioned with the name of *Ἀγῶγος* (leader), for the author, and his not remarking the meaning till the Chief Justice said — "You, Sir William, are meant, among others." But we happen to know that, within a few weeks of his decease, a dispute arising upon a Greek passage, and the sense of a particular idiom, he differed firmly with the company, and on examination was found to be right. This leaves no doubt on the point; but other proofs exist.

In his conduct as a professional man there have been attempts made by the uninformed, or the prejudiced, to point out one flaw; he is sometimes charged with having disappointed clients by taking briefs while he could not attend

to the business. No accusation can be more unfair, and it is not the less to be repelled and reprovèd because it is made against every man in full practice—we might almost say unavoidably made, as well as infallibly groundless. The first practitioners are always beset with applications from clients for their assistance. They cannot possibly tell whether on any occasion they shall be able to attend the court unless they confine themselves to a single court, which no great leader can do, and which the business of such occasional courts as the Lords and the Privy Council, having no bar of their own, would never permit. Consequently, clients must run the risk in question; but as they run it with their eyes open, they have no right to blame the advocate when the chance which they were aware of has deprived them of his aid. It was once said by Bearcroft, when much employed in committees, and seen walking about in the court of requests, unmoved by the many calls of his name in all quarters, that he was there to avoid giving undue preference to any of his clients. But a man whose conduct in other respects was so bad deserves not to be cited as an example. Sir W. Follett did only what all leaders do; his clients suffered only as all clients do that insist upon retaining a man of whose services they cannot be assured. The answer to their complaints is—"Go to inferior counsel, of whose attendance you can be assured." But this they never will do; and for why? Because every one feels that if he does not take the only effectual means of securing Sir W. Follett, his adversary will retain him, and then, peradventure, he may appear against him. Therefore, every one takes the chance of having him, with the risk of losing him, in order to ensure himself against the risk of having to meet him on the opposite side. Nothing can be more plain than this. Many instances might be given during Sir W. Follett's greatest popularity of clients insisting upon delivering briefs, though formally and distinctly told that he could not attend. Why did they so? Because some unforeseen accident might intervene to make his attendance possible; at all events to occasion his being retained by the other side.

Undoubtedly, a person with so many engagements must occasionally have found himself unable to perform some of

them; but we know that when such an event unfortunately occurred, no party concerned was more distressed at it than himself. While preparing this article, we have been told of a case by a most respectable solicitor in which he had specially retained Sir William to conduct an important cause for him at the assizes. When the time arrived he was prevented by a family affliction from attending; but not only did he attend at a subsequent assize without a second fee, which was quite a matter of course, but he pressed upon his client, who had been vexatiously made to pay the costs of the day, the full amount thus paid, amounting to 400*l.*, which the client as peremptorily refused to accept. A fact like this is worth a thousand surmises, and puts them all to flight; but we may confidently add our belief, that the items of fees returned or refused, from kindness and other voluntary motives, would be found to form a much larger head in his books than persons unacquainted with such matters would readily imagine. In one half year we believe he returned 800*l.*, and in the course of a few years 4000*l.*

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We have been kindly permitted to publish the correspondence which passed between Sir William Follett and Sir Robert Peel, in May last, with respect to his proffered resignation of the Attorney-Generalship. It is highly creditable to both parties.

Park Street, May 20, 1845.

My dear Sir Robert,

I am about to write to you on a subject painful to me, but which I am afraid I can no longer avoid. When I first returned to this country from the Continent, I felt no doubt, from the improvement that had then taken place in my health, that I should be able to give my regular attendance in the House of Commons, and to take my fair share of the business of Parliament, as well as the other duties of my office. But it has been ordered otherwise; and the fresh attack of illness under which I have been suffering since my return, has again obliged me to keep away from the House. This has distressed me much, holding the office which I do, and feeling that I was not able to perform one of its most im-



portant duties. Still I had hoped that it was temporary only, and that as the warmer weather approached the illness would be removed. My physicians have, however, recently announced to me that my present illness is much more serious than I had at first imagined, and that although I am now going on very favourably, yet that time and care and quiet are essential to give me a fair chance of recovering from it. This announcement makes me no longer hesitate in justice to you, and to the government and myself, to place my office of Attorney-General at once in your hands, and to pray of you to lay my resignation before the Queen whenever you may think it best that the vacancy should be declared.

I cannot, my dear Sir Robert, conclude this letter without saying how deeply grateful I feel to you for the unvarying kindness and friendship you have ever shewn me since my first entrance into public life; and I need not say the pain it gives me to write this letter, and to take any step to separate myself from you and from your government, with all the members of which I have so long cordially acted; but there seems to be no struggling against long-continued, though varying sickness, and I have no choice in submitting to inevitable misfortune.

I have not mentioned to any one out of my family my intention of writing this letter, as it has struck me that it may not at this moment be convenient to the government to have a sudden vacancy announced in the law offices of the crown, and that it might be better to arrange with you when my retirement should be made public.

Always, my dear Sir Robert,  
Most sincerely yours,  
W. W. FOLLETT.

Whitehall, 21st May.

My dear Follett,

I received, with the deepest regret, on my return from the House of Commons, this morning, your letter of yesterday.

I will ask you, for the present, to confine the communication of your wishes and feelings with regard to Retirement exclusively to me. It would give me the greatest pain to contemplate the necessity of your absolute relinquishment of office. There is no temporary arrangement which I would not make — no relief to you from labour and anxiety connected with official or parliamentary duties which I would not most cheerfully propose, rather than choose the alternative of permanent separation from you.

I am deeply grieved that you have not made more rapid advances towards recovery; but earnestly hope that complete repose

and the approach of milder weather will, at no distant period, re-establish your health, and enable you to resume your usual occupations.

With feelings of regard and esteem which I cannot adequately express,

Believe me, &c.

ROBERT PEEL.

The Attorney-General.

[In a subsequent letter, a copy of which we have seen, Sir Robert Peel begs him "to retain the office of Attorney-General, with the distinct understanding that he should not be asked, on any occasion, to attend the House of Commons, and for the present should not hear a word on professional business."]

## CORRESPONDENCE.

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[In conducting this Journal we shall be willing under this head to insert any letters, &c. in opposition to the views maintained in our pages. But of course we expect that any such letters shall be in temperate language ; and we may also hint that they must not be too long, as the space to be devoted to them is very limited.]

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THE great question of Parliamentary Privilege is not of course to be lightly handled, and we shall not pronounce any thing like an opinion on it ; but the following Protest contains the argument on one side, and it is that on which the Lord Chief Justice and other lawyers concur :—

### PROTEST ON PRIVILEGE OF PARLIAMENT, JULY 4. 1845.

#### Dissentient—

1. Because this House is now for the first time interfering to stop by force an action brought against a party for a wrong done to a fellow-subject in slanderous words, alleged to have been falsely spoken, and is thus interposing its power, under the name of privilege, between the subject and its strict legal right, sought to be made good in a court of law by the course which the law has prescribed.

2. Because, whatever right the House may be supposed to derive from precedent, that is, from former instances in which it has exercised similar powers, there can be no doubt that in former times both Houses of Parliament were wont to do many acts, under the name of asserting their privileges,—acts which, in the present day, and for a long time past, both Houses of Parliament have wholly abstained from doing, and which would now be considered by all mankind to be gross and wanton violations of all justice.

3. Because, though the right, however founded, or however proved, to do such acts as these, or even such acts as the present of a far less objectionable kind, were admitted, yet it is always a question of expediency and discretion whether or not this power,

even if it be possessed by right, shall in any given case be exercised; and it ever behoves both Houses of Parliament to be most cautious and abstinent in the use of powers like these, which are assumed by them over parties charged with offending against themselves, and are used by them in their own case without the intervention of any impartial and judicial authority.

4. Because it is, in a peculiar manner, the duty of both Houses to abstain from such acts, when they reflect that there is no code of privilege promulgated whereby the people may know against what law they offend; that the law is in each case declared, possibly made for the first time, after the alleged breach of it has been committed, and made in the heat of the strife occasioned by the alleged offence; that the members of the two Houses always differ among themselves both as to the law and its application, and that they who promulgate it are at once the lawgivers, parties, prosecutors, jurors, judges, and executioners; while in this instance alone no power of extending mercy to the offender exists in the state.

5. Because it behoves this House in a more peculiar manner to avoid placing itself in so strange and anomalous a position, seeing that as it is the supreme court of justice in the last resort in all cases criminal and civil, so it ought to be most anxious ever to set the example of strictly just, regular, legal procedure, and should most carefully shun all violations of law and justice, and should especially be slow to interfere with pending actions, which may in their result come before itself as a high court of appeal.

6. Because the cases in which it is expedient and justifiable, from absolute necessity, to interfere with the rights of individuals and the ordinary course of the law, are of a description wholly different from the present, being actual obstructions, offered to the proceedings of the Houses, and which must be removed without any delay, else the arm of Parliament would be paralysed; and because no objection could ever be raised to such an exercise of power, and of rightful power, either by the two Houses or by any other tribunal. But constructive contempts like the present are of a wholly different description, and no harm whatever can arise from allowing them to be dealt with by the course of the law as administered in the regular courts of justice—those courts to which the Sovereign as well as the meanest of his subjects must always resort for the establishment of rights and punishment of wrongs—those courts to which the Houses of Parliament may most safely resort as the abodes of strict justice—courts pure from all taint of corruption, free from all bias of influence, uncontrolled by the threats either of regal authority or aristocratic insolence, or popular

violence, and to which neither faction nor fear can ever gain access.

7. Because the argument that witnesses must be protected from vexatious and costly suits is wholly inapplicable to the case, inasmuch as no one pretends to doubt that they may be prosecuted at the instance either of the Crown or any individual, whether a member of the House or not; and if so prosecuted, never could recover one farthing of their costs, though ever so honourably acquitted.

8. Because no punishment which can be inflicted either by a prosecution, or by the House upon a witness for the most wanton and the falsest slander of an individual, can afford any reparation whatever to the party thus injured, as the House has not by law the power, if petitioned; to give any such compensation.

9. Because the protection of witnesses before the Houses of Parliament never can be regarded as more essential to the public weal, than the protection of witnesses before the courts of civil and criminal judicature; yet no one pretends to doubt that an action may be brought against any person for slanderous words falsely spoken by him in giving his evidence before these courts; and though no damages could be recovered if the words were spoken in answer to a question put in the cause, yet it is quite certain that the action must take its course, and that nothing could be done by the court to stop it; so that the witness must be exposed to exactly the same vexation and expense which are alleged to form the only ground for interfering to stop the action in the present case.

10. Because the order to prevent a defendant from pleading, or the commitment of the plaintiff for a constructive contempt, never can really stop the action, which may proceed through all its stages whatever be done to the parties; unless indeed the greater and unheard-of violence were committed of arresting the judges and their officers, and destroying the record and tearing the proceedings from the file.

11. Because all the arguments drawn from alleged analogies in a court of equity are wholly wide of the question, inasmuch as the granting an injunction to stay actions at law, or to prevent receivers and other officers, or quasi officers of the court being sued for acts done under its authority, are not granted discretionally, but are matter of strict right: and inasmuch as such injunctions only prevent the party against whom they issue from obtaining his remedy in one form, reserving it to him in another, nay, securing it to him in the court which stays the action; whereas the present

proceeding deprives the party of all remedy whatever, the House having no power or authority to grant him redress.

12. Because it is a great aggravation of the mischief so justly complained of, that for the last nine years the other House of Parliament has sold all the papers printed by its authority, allowing a discount to encourage the trade in those publications: and that though this House has not as yet engaged in this branch of business, yet it communicates its prints to the other, which sells them with its own.

13. Because the inexpediency, injustice, and cruelty of exercising the alleged privileges of the House is strongly illustrated by the peculiar circumstances of the present case. A complaint is made by a peer that an action has been brought against a witness. The defendant is publicly described as a most respectable person, who had served well in the Peninsula; to the plaintiff is applied the most severe and even coarse expression, while in no court that tried the case could such praise or censure of the character borne by the parties ever be heard for an instant, much less proved in evidence; and while it is also manifest that precisely the same course must have been pursued had the respectable man been the slanderer, and the censured man been the injured party. Under the prejudices excited by such statements, the parties are examined at the bar. The plaintiff is compelled to disclose his case to the defendant. He describes himself as grievously injured, and as severely suffering from the effects of the attack made upon his character by the defendant. He further declares that he was wholly ignorant of the privileges of the House, wholly unconscious of having acted in breach of them by bringing his suit—a thing the more easily believed when we reflect that the nature of parliamentary privilege was distinctly stated in debate to be wholly unknown to the judges of the land, and only understood by the House itself. Finally, the attorney, who has been seized and imprisoned for following his client's instructions, declared that he had acted under the advice of counsel, and afterwards informed the House, through a peer, that he had received directions to discontinue the action; yet both client and attorney are imprisoned,—the attorney after this communication was made; and nothing whatever is done against the counsel who deliberately advised the whole proceeding.

14. Because nothing can be more unlike all the judicial proceedings to which the present has been compared than the course now pursued, inasmuch as whenever the law has declared that a court shall not proceed in any case by reason of another jurisdiction being interfered with, a particular mode of preventing this pro-

ceeding is provided by the known law; and in another and important particular, the present proceeding is extremely unlike that of injunction, to which it has been likened, for an injunction is commenced to stay proceedings in one court, in order that justice may be done in another which has possession of the suit; nor is any one prevented unless he disobey the order so given; whereas we issue no order, but at once proceed to punish the party before he has been guilty of any disobedience, or had any opportunity of doing what we desire he should do, and we punish him on the sole ground of his having broken some privilege unknown to him, and which we admit is understood by nobody but ourselves.

15. Because, finally, it is all along assumed in the course of these discussions, that whatever privilege we do not in any case exercise, we cease to possess; whereas there are many privileges most undeniably belonging to us, some which in former times were constantly exercised—some which we still declare to be ours on the face of our standing orders—and none of which have now for a long time past been exercised at all; and in the illustration of the varying usage which exists respecting such privileges, it may further be remembered that a very great change has come over this question, even within the last forty years; as no one can affect to think that either the Houses of Parliament or the courts of justice would at this day punish summarily for contempt those acts which frequently were thus visited within that period of time, including the very publication for which Sir Francis Burdett was sent to the Tower, and which raised the last great discussion of the privilege question in Parliament, in the courts of law, and in this place.

BROUGHAM.  
WICKLOW.

The Earl of Radnor was prevented signing this protest by accident.

# SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST MAY, 1845.

| COURTS.                        | REPORTERS.                                      |
|--------------------------------|-------------------------------------------------|
| House of Lords - - -           | Clarke & Finnely. Vol. 11. part 2.              |
| Privy Council - - -            | Moore.                                          |
| Lord Chancellor - - -          | Phillips.                                       |
| Rolls - - -                    | Beavan.                                         |
| V. C. of England - - -         | Simon. Vol. 13. part 2.                         |
| V. C. Knight Bruce - - -       | Collyer. Vol. 1. part 3.                        |
| V. C. Wigram - - -             | Hare. Vol. 4. part 1.                           |
| Court of Review - - -          | Montagu, Deacon, and De Gex. Vol. 3.<br>part 4. |
| Queen's Bench - - -            | Adolphus and Ellis. Vol. 4. part 4.             |
| Common Pleas - - -             | Davison and Merivale. Vol. 1. part 3.           |
|                                | Manning and Granger. Vol. 6. part 2.            |
|                                | Scott. Vol. 8. part 2.                          |
| Exchequer - - -                | Meeson and Welsby. Vol. 13. part 2.             |
| Ecclesiastical - - -           | Curteis.                                        |
| Admiralty - - -                | Robinson.                                       |
| Lord Chancellor of Ireland - - | Jones and Latauche. Vol. 1. parts 2. & 3.       |

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GRAY v. THE QUEEN. 11 Cl. & Fin. 427.

*Cessante Ratione, Cessat Lex. — Limitations of this Maxim.*

The present case, though not involving in its subject matter anything of much legal interest, may serve as a good example of



the caution to be used in the application of abstract and general legal maxims. A prisoner in Ireland challenged, as they were called into the box, and before they were sworn, two of the jurors peremptorily, and without showing any special cause or ground of challenge. The challenges were overruled by the Court, the indictment tried, and the prisoner found guilty. The ground that appears to have been relied on by the majority of the Irish judges was, that peremptory challenge originated *in favorem vite*, and that the offence for which the prisoner was about to be tried being, in consequence of a recent statute, no longer punishable capitally, and life consequently not in danger, it was in effect a case for the application of the above maxim. Of the English judges who attended the House of Lords one Baron alone agreed with the majority of the Irish judges, the others were unanimous against them, as were all the Lords who delivered an opinion. Their conclusion was briefly and clearly stated by Lord Campbell: he says, "With all respect to the majority of the Irish judges, and to the learned English Baron who agrees with them, they seem to me to have confounded the reason with the rule. Favour to life may very likely have been the reason why the rule was laid down, that in all cases of felony the prisoner on his trial should be entitled to peremptory challenge, but there can be no doubt that the rule was established. The rule being established must remain till altered by the legislature."<sup>1</sup>

<sup>1</sup> An allusion to the above maxim (or a similar one) occurs in the judgment of Mr. Justice Willes in a very celebrated case (*Perrin v. Blake*), where perhaps the only safe application of it is correctly stated. He is speaking of the rule in *Shelley's* case. "The maxim itself grew with the feudal policy, and the reasons of it were antiquated. The logicians say '*cessante causâ, cessat effectus*,' and surely the lawyer may say, I will confine an old rule within its exact bounds, and extend it as little as possible."

The observations of a learned and well-known writer on this subject are so able, that we are tempted to transcribe them even from a book to be found in every legal library.

"It is true, where those things which are the objects of any rule of law cease to exist, there the rule itself must of necessity cease for want of subject matter to relate to, or to have any effect upon; but it by no means follows that where the same objects of a law still continue, that there the law should cease, only because the very state of things which was the first occasion of it no longer exists.

"While the same subject continues, there must be still the same necessity for some rule or regulation in respect to it. But if the old rule of law were to cease with the circumstance or state of things which gave it birth, the subject would remain at large, unregulated by any law, and exposed to the arbitrary direction of ignorance, partiality or caprice, until the legislature should interfere and make a new law respecting it. This would be opening a door perpetually to all that uncertainty, confusion, and inconvenience which laws and rules were

*Next of Kin.*

This is a subject on which the first impression on most minds probably is, that nothing can be much plainer or more simple, but which a little investigation shows to be in a very obscure, unsettled, and unsatisfactory state.

Certain provisions in the will of a testator had rendered it necessary to refer to the Master to inquire, 1st, who were the next of kin of the testator living at his death? 2nd, who was or were the nearest in blood of the testator *ex parte paternâ* living at his death? 3rd, who were his nearest of blood *ex parte paternâ* living at the same period, exclusive of his daughter and only child? and, 4th, who were his nearest of blood *ex parte paternâ* living at the death of his widow? The third inquiry was directed in consequence of the testator having directed, in case of his daughter dying before a certain period, a certain portion of his property to go "to my other next of kin of my paternal line." And in all the last three inquiries it is stated that "the words next of blood were used instead of next of kin, in order to prevent the Master finding, as he otherwise would have done, who were the testator's next of kin according to the statutes of distribution"<sup>1</sup>, it having, as is well known, been finally settled by the Lords Commissioners in the case of *Elmsley v. Young*<sup>2</sup> that the Court must consider the words next of kin used *simpliciter* in a limitation, irrespective of that statute.

The Master found, 1st, that the daughter and widow of the testator were his next of kin at his death; 2nd, that the daughter was the nearest of blood *ex parte paternâ* at the same time; 3rd, that the testator's three brothers and his sister were his nearest of blood at the same time irrespective of his daughter; and, 4th, that the two children of his daughter and his two surviving brothers were the nearest of blood of the testator at the death of his widow.

One of the brothers excepted to this finding, insisting that the testator's brothers and sister ought to have been included with his

intended to obviate and prevent. The conclusion is, that every rule of law once established continues to be so while the subject of it exists, until altered by some solemn act of legislation." — *Fearne*, p. 88.

The above case might perhaps tempt a hasty reader (it would only be a hasty one) to concur in the dictum of an ancient jurisconsult: "*rationes eorum quæ constituuntur, inquiri non oportet: alioquin multa ex his quæ certa sunt, subvertuntur.*" — *Neratius in Dig.* 1. 3. fr. 21.

<sup>1</sup> On that point, however, see the observations, post.

<sup>2</sup> 2 M. & K. 780.

daughter as the nearest of blood *ex parte paternâ* at his death; 2nd, that the two grandchildren were not two of the nearest of blood *ex parte paternâ* at the death of the widow; but, 3rd, that the surviving brothers were the only nearest of blood *ex parte paternâ* at that time.

It will be seen that the Master, in computing the relationship, had adopted the rule of the civil law, and the exceptions were grounded, partly on the argument that, as he was directed to inquire simply and without reference to property of any kind, he ought to have computed the degree of relationship, not according to the civil, but according to the canon, which, for this purpose, is said to be the common law<sup>1</sup>; partly on the argument that the testator having used the words "of my paternal line" showed that he meant, not his own descendants, but the descendants of his father.

The Vice-Chancellor, however, pronounced that he knew of no case which had decided how proximity of blood shall be determined without reference to property; that the testator clearly meant himself as the propositus; and that as the question was one relating exclusively to personal estate, the Master was right in adopting the civil law mode of computation.<sup>2</sup>

<sup>1</sup> It does not seem entirely clear, however, that such is the case. One of the editors of Blackstone remarks (2 Chitty, Bl. Com. 207. note), "It is said that the canon law computation has been adopted by the law of England, yet I do not know a single instance in which we have occasion to refer to it."

<sup>2</sup> The above case cannot, perhaps, be looked upon as entirely satisfactory, although the result arrived at may be correct. With respect to the suggestion of there being 'no case deciding how proximity of blood shall be determined without reference to property,' it is submitted that there must, however, be some means of doing it. The statute of distribution, so often referred to in connection with the expression 'next of kin,' has, in reality, nothing whatever, properly speaking, to do with it—(the entire incorrectness of associating them together is pointed out by the Master of the Rolls in *Withy v. Mangles*, 4 Beav. 365.): but as its provisions are known to have been adopted from the 118th Novell, and to be therefore connected with the civil law of succession, and as the 'next and most legal friends' to whom by 31 Ed. 3. c. 11., and the 'next of kin' to whom by 21 Hen. 8. c. 5. administration is to be granted, were (2 Bl. Com. 504.) to be reckoned according to the computation of the civilians, and depended, therefore, upon the civil law of consanguinity, the common notion of connecting them together may perhaps have originated from this source. The civil law of succession and the civil law of consanguinity are, however, very distinct things, as is carefully pointed out in that title of the Pandects which relates to the latter: "*Sed admonendi sumus, si quando de hereditate vel bonorum possessione quaeramus, non semper eos, qui ejusdem gradus sint, concurrere.*" (Dig. 38. 10. fr. 1, 2.) In oblivion of this clear fact, it was attempted in the

CRAIK v. LAMB. 1 Coll. 489.

*Lineal Relationship.*

This is one of those cases occupying so very large a space in the modern reports, in which the sole function that the Court is called upon to perform is to put a construction upon a private instrument, by attempting to give an intelligible sense to language which does not itself possess any. Such cases having for the most part an entirely individual and special character, it would perhaps result in no loss to jurisprudence, and in some gain in other respects, if nearly the whole of them were omitted by the reporters. The present case, however, involves considerations a little more general than most of its class.

A testator who had been once married, and had had one child, but who several years before the date of his will had lost both wife and child, (the latter at the age of three years,) and who, to quote the language of the Vice-Chancellor, "does not appear to have contemplated a second marriage, or to have supposed or suspected, or to have had any reason for supposing or suspecting, that he had, or was likely to have, any issue, legitimate or illegitimate," gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him by *lineal* descent.

The Master being directed to enquire whether the testator had,

case of *Withy v. Mangles* to prove the order of consanguinity in the civil law by quoting (from 4 Burge Com. 31.) the civil law order of succession.

It should be added, that, it having become a rule in the Ecclesiastical Court that the right to administration follows the right to the property, and that Court having consequently adopted as a general rule, in granting administration, the order of succession and not of consanguinity, the principle referred to in 2 Bl. Com. 504. is not true as he probably meant it; and this suggests a doubt whether, to adopt the words of his editor, there is 'a single instance' in which the computation of the civilians, any more than that of the canonists, as to consanguinity simply, is adopted in the law of England.

With farther reference, however, to the remark of the Vice-Chancellor, it may be added that the case of *Withy v. Mangles*, above referred to, decides at least, that, according to the law of England, the father and mother of a person are *simpliciter*, and for the purpose of carrying out the decision of *Elmsley v. Young*, equally near of kin to him with his children,—a point which, perhaps, may be considered to have been also ascertained long ago in *Collingwood v. Pace* (1 Ventr. 414.), where it is said that "a father is certainly as near of kin to the son as the son to the father." If, however, this is the only point that has been settled in the law of England, as to the order of consanguinity necessary to be ascertained *simpliciter*, for the purpose of carrying out the decision in *Elmsley v. Young*, and for other purposes which might easily be suggested, it is evident that a great deal yet remains to be done.

at the respective times of making his will and of his death, any and what relations by lineal descent, found that the testator had at those times relations by lineal descent, four first cousins *ex parte paternâ*, who were also his next of kin *ex parte paternâ*, and two of whom were his heirs at law, and two first cousins *ex parte maternâ*, who were also his next of kin *ex parte maternâ*.

For the heirs at law, it was attempted to be contended that the words "relations by lineal descent" must mean descendants according to the course of law ; and therefore that the heirs were entitled to the real estate ; or that, supposing the expression doubtful, it must be interpreted for the benefit of the heirs. For the cousins *ex parte paternâ*, it was suggested that by relations by lineal descent the testator might mean relations by blood, as distinguished from relations by affinity. For those *ex parte maternâ*, counsel are stated to have cited from Shakspeare's play of King John (act ii. sc. 1.), the lines

" Peace be to France, if France in peace permit  
Our just and lineal entrance to our own ; "

with the observation that, from the circumstance of King John's descent, the word lineal could not there be used in reference to a direct line of descent from father to son.

The Vice-Chancellor, after observing that, considering the circumstances of the case, it was impossible to suppose that there could be any reasonable person who would not be unwilling to interpret the instrument as contended for by the heirs at law, unless compelled by necessity, that is, by some inevitable rule of law, to do so, — that every man reading the will, with a knowledge of the facts, must believe that in all probability the words "by lineal descent" were used ignorantly or not advisedly, but that still the words might be too strong to be surmounted, — states, that at first his impression was, that they were too strong, but that that impression had, though not without some difficulty, been removed from his mind ; and then proceeds in the following language : — " Certainly, unless the words ' by lineal descent ' are understood as the heirs at law contend they should be, they are mere surplusage (subject, however, to the meaning of the word relations), while by so construing them, operation and effect are unquestionably given to them, a consideration generally or often of weight in questions of construction ; nor is it to be forgotten, that it lies upon those who allege that an heir is disinherited by a will to prove that the will does so. Still, though unnecessary and unusual, it cannot, I think, be considered absurd or untrue to speak of proving collateral kindred to a man by lineal descent, meaning

lineal descent from one of that man's progenitors, in no other way than which, can collateral kindred exist." (His Honor then proceeds to some other considerations which it does not seem very material to notice here; and finally adds): "My ultimate conclusion is, therefore, against the heirs at law; though I cannot represent myself as perfectly confident that it is correct. It must not be understood, that I give any opinion whether the word 'relations' comprehends within its proper meaning persons connected by marriage, though not of kindred in blood; in other words, whether relationship includes affinity."

[It would seem that, but for "the circumstances in which the testator stood," and the general "frame and tenor of the will," the Court would have held it "absurd and untrue to speak of proving collateral kindred to a man by lineal descent;" and it therefore not unnaturally expressed a diffidence of the correctness of its conclusion, that, in the particular case, it was not absurd or untrue. Undoubtedly, in their popular sense, the words lineal and collateral are directly opposed to one another, and farther, we find even Blackstone stating<sup>1</sup>, that "lineal relations are such as descend from one another:" and in a learned note to the present report, after tracing the use of the words "lineal" and "collateral" in some of the earlier works relating to real property, the conclusion arrived at is, that "the word lineal has now a fixed signification, which can be varied only by special circumstances." If by this is meant, a sense directly opposed to collateral, the instances cited do not themselves lead to that conclusion, and it may not perhaps be too trifling to notice as additional examples to the contrary, that in the table of the "*Gradus Parentelæ et consanguinitatis*," inserted in Coke<sup>2</sup>, we find the "*linea recta*" and the "*linea transversalis seu collateralis*." Perhaps, too, something of the same tendency might be urged from the circumstance of the double line used in the computation of the civilians in tracing the degrees of consanguinity, and on which *line* of course the most widely *collateral* relations may be found placed.<sup>3</sup> These considerations are undoubtedly very technical, but recollecting the general proposition once laid down, "that the law having fixed a determinate meaning to technical expressions will not permit their sense to be perverted, but directs the judges ever to adhere to them without the smallest departure<sup>4</sup>," it may be thought not irrelevant to have ventured to suggest that

<sup>1</sup> 2 Com. 203.

<sup>2</sup> Co. Litt. 186.

<sup>3</sup> For a table of the *Stemmata Cognationum* of the Civil Law, see the "*Corpus Juris Romani Antejustiniani*," Fasc. 1, Bonn, 1895.)

<sup>4</sup> Yates J. in *Perrin v. Blake*.

"lineal" and "collateral," as terms of art, are not so directly opposed to one another as in popular usage.

After all that can be said upon it, the above case seems to come briefly to this: "lineal descent" can itself mean nothing more than descent simply; descent from himself the testator cannot have contemplated. The expression therefore, of "relations by lineal descent," may be taken as equivalent to "lineal relations." Having advanced thus far, the main difficulty is perhaps got over; and notwithstanding Blackstone's dictum to the contrary, the last observation may be thought to apply, and aid in removing the remaining objections to giving effect to the gift.]

HANSON V. KEATING. 4 Hare, 1.

*Wife's Equity to a Settlement against Mortgagee applying for Foreclosure.*

In the case of *Sturgis v. Champneys*<sup>1</sup>, the provisional assignee of an insolvent debtor, whose wife was entitled for her life to large landed property, being obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being outstanding in mortgagees, the Vice-Chancellor of England had refused to order any settlement, upon the ground that the Court will not secure such a provision unless the property be such as to be a proper subject of equity, and that the wife's interest being under the devise of a legal estate for life, it was by the accident only of a prior incumbrance being still subsisting, that the plaintiff was compelled to come into this Court. Lord Cottenham, however, reversed that decision in an elaborate and profound judgment, to be found in the report of the case above referred to.<sup>2</sup>

<sup>1</sup> 5 M. & C. 97.

<sup>2</sup> The following passages of it may perhaps be properly cited here as a not inadequate specimen of those judicial qualities which have gained Lord Cottenham so eminent a place among the most eminent of judges — the Chancellors of England. "Undoubtedly, for many purposes, this Court, acting upon the principle of following the law, deals with property coming under its cognizance from the legal estate being outstanding, according to the rights which would exist at law; but this is far from being universally true. *Cholmondeley v. Clinton* (2 Mer. 171., 2 J. & W. 1.), and the authorities upon which that decision was founded, are instances to the contrary. There are many cases in which this Court will not interfere with a right which the possession of a legal title gives, although the effect be directly opposed to its own principles as administered between parties having equitable interests only, such as in cases of subsequent incumbrancers without notice gaining a preference over a prior incumbrancer by procuring the legal estate. It may be to be regretted, that the rights of property should thus depend upon accident, and be decided upon, not according to any

In the present case the husband and wife had assigned by way of mortgage the equitable interest of the husband in right of his wife in a term of years. The mortgagee filed his bill against the husband and wife, and the trustee of the legal estate, for a foreclosure and assignment of the term. The wife claimed a separate provision out of the estate, and in support of her claim *Sturgis v. Champneys* was relied on. The Vice-Chancellor, in a long and somewhat elaborate judgment, seems to express alarm and dissatisfaction at that decision, pronouncing that "if that case were out of the way," he should have decided against the wife's claim; but that, however he might distinguish the facts of the present case from those of the other, its reasoning would remain, and he could not disregard it. He, therefore, reluctantly allowed the wife's application.

merits, but upon grounds purely technical. This, however, has arisen from the jurisdiction of law and equity being separate, and from the rules of equity (better adapted than the simplicity of the common law to the complicated transactions of the present state of society), though applied to subjects without its own exclusive jurisdiction, not having, in many cases, been extended to control matters properly subject to the jurisdiction of the Courts of Common Law. Hence arises the extensive and beneficial rule of this Court, that he who asks for equity must do equity; that is, this Court refuses its aid to give to the plaintiff what the law would give him if the Courts of Common Law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which this Court would not otherwise enforce. If, therefore, this Court refuses to assist a husband who has abandoned his wife, or the assignee of an insolvent husband who claims against both, in recovering property of the wife, without securing out of it for her a proper maintenance and support, it not only does not violate any principle, but acts in strict conformity with a rule by which it regulates its proceedings in other cases." . . . "A case more strongly calling for the application of that rule it is not possible to conceive. The Common Law gives to the husband the enjoyment of the life estate of the wife upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this Court, Equity, though it follows the law, and therefore gives to the husband or his assignee the life estate of the wife, yet it withholds its assistance for that purpose until it has secured to the wife the means of subsistence: it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle, the ordinary interposition of this Court in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a plaintiff, and if such be the principle, what difference can it make, where the assignees of the husband are applying to this Court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior legal trust estate?"



GOLDSWORTHY v. CROSSLEY. 4 Hare, 140.

*Probate of Wills of Married Women in Execution of Powers.*

The circumstances of this case were rather special, but some points of general importance were raised in the course of it.

A married woman having power to dispose of a fund, as she "notwithstanding any coverture, and as if she were sole and unmarried, should from time to time by any deed under her hand and seal duly executed in the presence of, and attested by, two or more credible witnesses, or by her last will and testament in writing, or by any writing in the nature or purporting to be her last will, to be by her signed, sealed, and published in the presence of the like number of witnesses direct, give, or appoint the same," by a will or testamentary paper signed in the presence of two witnesses, but not sealed, disposed of the fund in favour of the plaintiff.

The will was proved by one of the executors named in it, in the Consistory Court of the diocese of Chester, and administration limited to the goods, chattels, and credits of the deceased therein-after mentioned (enumerating the fund in question, and other sums of money), was granted to the executor. Two years afterwards administration of the goods, chattels, and credits of the testatrix was granted to the executor of her husband, who died after her. The latter brought actions against the plaintiff and other persons concerned, to recover the fund, upon which the plaintiff filed her bill, praying that the will of the testatrix might be declared operative in equity, notwithstanding the defect in the execution. The husband's executor, by his answer, insisted that the alleged will not being sealed or published in the manner prescribed by the settlement, was not valid or effectual as an exercise of the power of appointment; that he had instituted proceedings in the Consistory Court to recal the probate, and that that Court was not in fact the proper Court for the proof of the alleged will. By the evidence, it appeared that the probate purporting to be the probate of the will of the testatrix, granted out of the Consistory Court of Chester, had been recalled so far as related to the fund in question, apparently on the ground of the defective execution. It also appeared that the plaintiff had attempted to prove the will in the Prerogative Court of York, but her allegation had been rejected with costs. It was argued for the plaintiff, that the will was in fact proved, and that if it was admissible to proof, this Court would, on its own principles, and without regard to any exception out of the grant of administration, look into the case, and determine whether the will contained that which was a substantial and valid execution of the power. That the only question

which the Ecclesiastical Court had to determine was, whether the document was or not testamentary; whether it was or not in fact a will, and having determined it to be so, every other question was exclusively within the province of the Court of Construction. For the husband's executor it was contended, that there was no probate of any will of the testatrix being or purporting to be an execution of this power, although there was a probate of a will relating to other property; that on the application of the defendant, the Court had in effect and to every legal purpose annulled that part of the instrument.

The Vice-Chancellor: "I believe the practice of the Court formerly was not to require the probate of the will by which a married woman disposed of property under a power. This Court, however, at length thought right to require it, and it does so now. I must, therefore, require probate, until I am told the contrary by a judge of higher authority. If the court of probate has improperly refused to admit the will to proof, which I cannot assume, the matter may be set right by an appeal to the Privy Council, and if, as has been urged, that Court should act on principles different from those which this Court is in the habit of applying, and should, acting upon those principles, take upon itself to say that a document which in the opinion of this Court is good as an exercise of the power cannot be admitted to proof as a will, owing to some defect of form, it may be competent to this Court to resume its old jurisdiction and act independently of the Court of Probate. Upon these points I express no opinion further than to say, that I think the question cannot arise until the decision of the Court of Probate, which is called in question, has been reviewed and determined by the highest Court of appeal to which the decisions of that Court can be carried."

His Honor afterwards pronounces, that there being nothing but a probate granted for the purpose of administering other sums, expressly excluding the fund in question, "that is not the sort of probate which this Court requires." He, however, allowed the case to stand over, with liberty to the parties to take proceedings by way of appeal or otherwise, for the purpose of obtaining probate as to the property in question.

CHURCHILL v. MARKS. 1 Coll. 441.

*Restraint on Alienation. — Alienation by Insolvency.*

In the case of *Brandon v. Aston*<sup>1</sup> the Vice-Chancellor Knight Bruce decided that a provision for forfeiture "on any attempt to

<sup>1</sup> 2 Y. & C. C. C. 24.

mortgage, incumber, or anticipate" was given effect to by a petition to the Insolvent Court followed by the usual vesting order and the signature of the usual schedule.

In the present case there was a gift of 5000*l.* stock for the maintenance of children while under age, "and when the youngest child becomes of the age of twenty-one years, then this said 5000*l.* stock shall be sold, and the money shall be then equally divided between such of the said children equally, share and share alike. No one of the said children shall be allowed or shall ever *sell or part with* his or her share or interest in the said money until it shall be divided. If on proof of any one or more of them having done so, their, his, or her share shall from that time become the property of the other children."

There were six children, and four of them were living when the youngest attained twenty-one. One of them before the vesting of the fund on that event, being arrested and imprisoned for debt, had petitioned the Insolvent Court; the usual vesting order had been made, and the insolvent had signed the usual schedule. Under these circumstances the trustees of the fund filed a bill for the directions of the Court, and submitted that the decision must follow that of *Brandon v. Aston*, and that consequently the share of the insolvent in the fund went over to the other children who were living when the youngest attained twenty-one. For the provisional assignee it was attempted to be contended, first, that the expressions of the clause against anticipation in *Brandon v. Aston* were more extensive than any thing in the present will; and that presenting a petition to the Insolvent Debtors' Court was clearly not a sale, nor was it a *parting with* the interest. On this point, however, the Vice-Chancellor expressed himself clear that it was such a *parting with* the interest as was contemplated by the will. It was then argued that the restraint on alienation was void; that in the cases where a clause of that kind had been supported, the parties had taken an interest for life only, and that it was repugnant and void for inconsistency in all cases of absolute gift, whether vested or contingent. The Vice-Chancellor nevertheless held the clause to be good in the present case, appearing, however, (though the point does not appear in the final conclusion so distinctly as could be wished,) to take a distinction between the case of a contingent reversionary interest, which this had been decided to be, and that of an absolute interest in possession.<sup>1</sup>

<sup>1</sup> It is mentioned in the report that in the course of the argument an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be that a gift to A. in fee, with a proviso that if A. aliene in B.'s lifetime,

## BARTLETT v. GREEN. 9 Sim. 218.

*Rule in Shelley's Case. — Chattel Interests.*

This case turned on the point of law on which the leading authorities are the well-known cases of *Peacock v. Spooner*<sup>1</sup>, with *Dafforne v. Goodman*<sup>2</sup> and *Webb v. Webb*<sup>3</sup>, and which, as is also well known, those cases have left in a rather unsatisfactory state. Though generally and familiarly known, a few words of reference to them are necessary by way of introduction to the present case.

The general question is, whether a rule similar to that respecting limitations of freehold estate, that "where an estate for life is given to the ancestor followed by a limitation to his heirs, general or special, the subsequent limitation vests in the ancestor, and the heir takes not by purchase," holds in the limitation of personal estate also.

In *Peacock v. Spooner*, a long term being settled in trust for the husband and wife and the survivor of them, for so many years as they and the survivor should live, and after their deaths to the use of the heirs of the body of the wife by the husband, and Lord Chancellor Jeffries having decreed the whole to be vested in the wife who survived, the Lords Commissioners decreed that the heirs of the body took by purchase, and that it did not vest absolutely in the mother who survived, so as to go to her administrator, which last decree was afterwards affirmed in the House of Lords, though the judges were six to two against it. The case of *Dafforne v. Goodman* was similar, and the decree in it was grounded on the authority of the preceding.

Then followed the case of *Webb v. Webb*, in which a term of 100 years was assigned in trust for the husband for life, then for the

the estate shall shift to B., is valid. There does not certainly, at first sight, appear any very decisive argument against its validity. Probably, by research, cases might be found in which the question has been discussed, or which involve the decision of it one way or the other. There is an old case (*Spittle and Davis's Case*, 2 Leon. 28., Moor. 271.) where lands were devised, part to the testator's eldest son in tail, part to his youngest son in fee, "provided that neither of the said sons should sell or lease the lands so given to them, or do any act, &c., before they came to the age of thirty years;" and if either of them did, then the other should have the portion so devised to his brother. The eldest son leased the lands devised to him before he attained that age; and it was held that the entry of the younger upon him was lawful. This seems to involve, and if considered a sufficient authority, to decide the principle contained in the above question of the Vice-Chancellor.

<sup>1</sup> 2 Vern. 43. 195., 2 Freem. 114.

<sup>2</sup> 2 Vern. 362., 2 Freem. 281.

<sup>3</sup> 1 P. Wms. 132.

wife for life, and after their deaths for the heirs of the bodies of the husband and wife. The wife died leaving issue, the husband survived, and it was determined by Lord Keeper Harcourt that the whole term vested in the latter.

The observation on these cases of the most learned of the writers treating of such matters is<sup>1</sup>, that "the last case appears to have been the ruling authority ever since in cases of the like nature, and that of *Peacock v. Spooner*, it seems, is only attended to in cases exactly the same with itself, as was that of *Dafforne v. Goodman*."

It is stated, however, to have been laid down in an opinion on the present case given in the year 1827 "by an eminent counsel now holding a high judicial office," that in *Webb v. Webb* "the Court escaped from the rule in *Peacock v. Spooner*, as the circumstances were not precisely similar; but the reasoning of the Lord Keeper in the latter case was erroneous, and the decision of the House of Lords must be binding until reversed there."

In the present case of *Bartlett v. Green* the limitations in the settlement of a term of 2000 years were in trust for the husband for so many years as should expire in his lifetime, then for the wife for life, and after the several deceases of the husband and wife, for the heirs of the body of the husband and wife for so many years of the term as should expire in the life or lives of him, her, or them respectively, and after the several deceases of the husband and wife, and in default of issue of their bodies as before limited, for the husband's brother, his heirs, executors, and administrators for all the residue of the term.

The property had come into the possession of the personal representative of the wife, who survived, and the suit was instituted by the heir of the eldest son, claiming under the limitation to the heirs of the body, and it was argued for the plaintiff, that the cases of *Peacock v. Spooner* and *Dafforne v. Goodman* so closely resembled the present, that the Court could not hold the words heirs of the body in this case, words of limitation, without overruling a decision of the House of Lords; that in *Webb v. Webb* Lord Keeper Harcourt could not overrule, nor indeed did he profess to overrule the decision of the House of Lords. But the Vice-Chancellor, without requiring an argument from the other side, decided that he could not distinguish the present case from *Webb v. Webb*, and expressed his opinion that in that case Lord Harcourt "*in effect overruled* the authority of *Peacock v. Spooner* and *Dafforne v. Goodman*,"—a result from which that intimated by

<sup>1</sup> Fearn, *Ex. Dev.* p. 493.

Fearne, though expressed in more guarded language, does not perhaps practically differ.

It is stated that the decree in the present case has been appealed from.

WALSH v. GLADSTONE. 13 Sim. 261.

(And see 1 Phill. 294.)

*Papers admitted to Probate in the Ecclesiastical Court treated as Nullities in the Court of Chancery.*

"In *Gawler v. Standerwick*<sup>1</sup> Sir Lloyd Kenyon M. R. said that the codicil in that case having been proved in the Spiritual Court, he was bound to receive it as a testamentary paper, but having done so, this Court was to construe it. The construction which his Honor put upon the codicil was that *it operated nothing*."

The present case, though not with quite equal simplicity, was brought to a similar result.

The testator, some time before his death, delivered to his butler two sealed packets addressed to his bankers, with directions to retain them until after his death, and then to present them at the banking house. On being opened after the testator's death, they were found to contain two cheques, dated September, 1833, one in favour of the butler, the other of another servant. In November, 1834, he made a testamentary instrument, by which he gave a life annuity to each of these servants. He then bequeathed *the residue* of his estate, and *revoked any former will or codicil*.

The Ecclesiastical Court admitted this instrument and the two cheques to probate, as constituting together the testator's will.

On a petition in the cause presented by the residuary legatees, the question was, whether the servants were entitled to be paid the amount of the cheques in addition to the annuities, or whether they were entitled to the annuities only. It was argued on their behalf, that the revocation clause in the testamentary instrument of November, 1834, could not be held to apply to the cheques, because that clause, being a revocation of former wills and codicils, could not affect papers which had been decided by the only competent tribunal to be subsisting parts of the will; that the Ecclesiastical Court never admitted to probate instruments that were wholly revoked, and for that reason alone the Court of Chancery was precluded from considering the cheques as revoked.

The Vice-Chancellor, however, and on appeal the Lord Chancellor, both held that, though the Ecclesiastical Court for the pur-

<sup>1</sup> 2 Cox, 15.

pose of admitting the papers to probate, had *necessarily* taken on itself the jurisdiction of construction, yet that nothing done by the Ecclesiastical Court in the way of construction binds the Court of Chancery, and they both expressed a decided opinion that the testamentary instrument of November, 1834, had revoked the other two.<sup>1</sup>

<sup>1</sup> It may not be irrelevant to suggest that there seems a conformable analogy between the effect of this case, and of one which has decided that notwithstanding the question of who are an intestate's sole next of kin, having, for the purpose of granting administration, been put in issue, and decided in the Ecclesiastical Court, such decision is not conclusive in a suit instituted between the same parties for the distribution of the assets in the Court of Chancery. *Barrs v. Jackson* (1 Y. & C. C. C. 585.).

There are two other points, however, in which the Court of Chancery has shown a greater deference to the jurisdiction of the Ecclesiastical Court, although the effect has perhaps been to deprive itself of opportunities of carrying out some of the most characteristic and beneficial of its principles. 1. As to wills of married women in execution of powers, the Court of Chancery has, as is well known, since the case of *Ross v. Ewer* (1 Atk. 156.), made it a practice to require probate of them to be obtained from the Ecclesiastical Court; a rule by which it may perhaps be hereafter found, under the operation of the tenth section of the Wills Act, to have deprived itself, to some extent, of its established jurisdiction of relieving against defective execution, and to which there seem to be so many other anomalies attached, that it is not surprising to find the Vice-Chancellor Wigram, in *Goldsworthy v. Crossley* (4 Hare, 145.), suggesting that "it may be competent to the Court to return to its old jurisdiction, and act independently of the Court of Probate." 2. If the decision of the Lord Chancellor in *Allen v. Macpherson* (1 Phill. 133.) as to the exclusive jurisdiction of the Spiritual Courts on the point there raised should be finally established, the effect of the decision, however correct in itself, will at any rate practically be, to have deprived the Court of Chancery of a very beneficial opportunity of applying its principles to the prevention of fraud. That case, as is well known, now awaits the final judgment of the House of Lords. It is not ventured to suggest how far any analogy which the above case and the one first referred to in this note may be considered to bear to the original decision of the Master of the Rolls, in *Allen v. Macpherson*, might have been used as an argument for sustaining that decision. On mere principle, and without reference to authorities, it may perhaps be thought that the points in *Barrs v. Jackson* and *Walsh v. Gladstone* formed quite as appropriate subjects for the application of the doctrine of *res judicata* as those in *Goldsworthy v. Crossley* and *Allen v. Macpherson*.

[Since this was written the decision of the Vice-Chancellor Knight Bruce in *Barrs v. Jackson* has been reversed by the Lord Chancellor. The four cases, therefore, which have been here referred to as seeming to present, on mere principle, (doubtless a very insufficient and unsafe basis,) an appropriate field for conformity of decision, are no longer equally divided. As they stand at the present moment, three of them tend to establish the conclusiveness of the decisions of the Ecclesiastical Court upon matters which come into question both there and in the jurisdiction of Chancery, and one only inclines the other way. A reversal of *Allen v. Macpherson* would again bring them to a state of equal division.]

## THWAITES v. FOREMAN, 1 Coll. 409.

*Assets. — Priority of Bequests.*

This case, though turning on the intention of a testator, and therefore mainly depending on the construction of a particular instrument may yet be referred to as an illustration of the weight of evidence required to induce the Court to imply from the expressions of particular instruments an intention at variance with one of its general rules.

The trusts declared of the residuary estate were *in the first place* to pay a debt due from the testator, *and then* to set apart and invest a sufficient sum to satisfy certain annuities bequeathed by the will, and in the next place, *after making such investment*, to pay the legacies bequeathed. The assets being insufficient to pay the legacies and annuities in full, it was held that the annuitants had no priority over the legatees, and that the above expressions, though appearing at first sight to direct an order of payment, were in fact merely words of enumeration.

The Vice-Chancellor. "*Primâ facie*, all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing. Now in considering whether such was the intention of this testator, we must recollect that words that are merely introductory cannot generally by themselves be held to direct any order of payment; we should also bear in mind an apposite observation of Sir John Leach, that unless the testator tells you himself that he believes his assets to be insufficient, you must attribute to him the notion that he has sufficient to satisfy all the bequests that he makes<sup>1</sup>, and if you attribute that notion to him you cannot well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient..... Upon the whole, I think that with respect to the question of priority, the utmost effect that can be given in favour of the plaintiff to the language of the will is to say, that it creates a doubt as to the intention; but this, as I have already said, is not sufficient to change the general rule as to the order of bequests."

<sup>1</sup> There is at this passage of the report a reference to the Institutes (1. 6. 3.) for the proposition that "*Sæpe de facultatibus suis amplius quam in iis est sperant homines.*" A very certain truth, and one of which very striking illustrations might probably be cited from a variety of sources.



Somewhat similar in its subject-matter, but not in its ultimate result, to the above, was the case of

CREED v. CREED. 11 Cl. & Fin. 491.,

In which the House of Lords was called upon to decide between two conflicting decrees made by two successive Lord Chancellors of Ireland, Lord Plunket and Sir Edward Sugden, and which we notice, in conjunction with the above case, on account of the same general rule being adverted to by Lord Cottenham.

The testator in this cause gave his wife his freehold estate of B., and certain specific chattels, and also an annuity for her life charged upon all his real estates except B. He then charged his debts upon his real estates except B. in aid of his personal estate, and gave an annuity to his sister, in similar terms to those used respecting that given to his wife. He next gave several pecuniary legacies to nieces and others, to be paid out of the residue of his personal estate, and in deficiency thereof to be raised and paid to them out of his real estates except B.; and he charged the same therewith. He lastly gave two annuities to his servants, in similar terms to those used respecting the preceding annuities.

The personal estate was insufficient to pay the debts and legacies; the real estate was insufficient to pay the annuities and legacies.

By Lord Plunket's decree the annuities were declared entitled to priority over the legacies. By Sir Edward Sugden's decree it was declared that the legacies and annuities were not entitled to any priority one over the other, but were to abate rateably.

Lord Cottenham, in delivering his opinion, enters minutely into the construction of the will, and then proceeds:

“If this be the true construction of the will, the application of the rule of equity to the case is very simple. Each claimant under the will must first resort to the fund primarily liable to his demand. If the personalty had been large and the realty small, the legatees would have had the advantage over the annuitants, and as the reverse has proved to be the fact, the advantage is on the side of the annuitants. It is true that equity aims at equality, and inclines to the construction which promotes it, but the intention, if expressed, must be the guide, and it seems to me impossible to put the annuitants and legatees upon the same footing without doing violence to every provision of the will. Is it, for instance, consistent with the declared intention to treat the personal estate as equally applicable to provide for the annuitants and to pay the legacies? Yet this is the effect of the decree appealed from. To support this decree it must be shewn, not only that the legacies are payable *pari passu* with the annuities out of the realty, but that the annui-

ties are payable *pari passu* with the legacies out of the personalty, otherwise the equality aimed at will not be attained.

Sir Edward Sugden's decree was therefore reversed.

Ex parte CHRISTIE. 3 M. D. & D. 736.

*Bank Notes. — Signature by One of a Firm.*

This case involves a question of very great practical importance, on account of its being probably the custom for nearly all banking copartnerships to issue their notes in the same form. In the present case it was as follows :

" L. & L. bank.

£5 0 0.

" I promise to pay the bearer on demand Five Pounds here or at Messrs. W. D., L. T. & Co. Bankers, London, value received.

" For J. C., R. M., J. P., & T. S.

" R. M."

This note was first proved against the joint estate of the partners, but the holder had obtained an order to withdraw this proof, and to tender such proof as he might be advised against the separate estate of R. M., without prejudice to the question whether he had or had not a right to prove against the separate estate. The Commissioner having admitted the proof, an application was now made to the Court of Review to expunge it.

The respondent's case was rested almost entirely upon the case of Hall v. Smith<sup>1</sup>, which, it appeared, had also formed the ground on which the Commissioner had admitted the proof. That case was an action of assumpsit on a note similar in form to the above brought against the partner alone who had signed the note. He had pleaded in abatement, and the plea was held bad.

It was argued on the other side that the grounds of that decision were not satisfactory, and it was attempted to be contended that it was a decision on a question of pleading, and did not really affect the substance of the remedies of the parties, for if the plea in abatement had been allowed to prevail, and a joint action had been brought, execution might have been issued against any partner separately upon it, and the same result would have taken place.

Sir G. Rose in the course of the argument, after seeming to concur in the argument that the cases at law "went off on the pleadings," intimates that the effect of bankruptcy would be to introduce quite a different state of things from that which would exist while the parties remained solvent. The reasons which, in his actual judgment, he assigned for the decision to which he came, might perhaps be made intelligible if sufficient space could be de-

<sup>1</sup> 1 B. & C. 407.

voted to the investigation ; but we find it impossible to do so in any limits which can be here allotted, and we therefore merely state that he ended by ordering the proof against the separate estate to be expunged.

The report of the case concludes by stating that an appeal has been heard before the Lord Chancellor, and stands over for a case to be sent to a court of law.

The point, therefore, remains still to be finally decided.<sup>1</sup>

YOUNG v. LORD WATERPARK. 13 Sim. 199.

*Currency for the Payment of a Settlement or Security executed Abroad. — Foreign or English Rate of Interest.*

Questions arising out of the locality of contracts, and the conflict of laws thence sometimes resulting, are, in all probability, in consequence of the increased foreign residence of English subjects, an extending class. For this reason the above case may be briefly noticed, although the report of it is not of a kind to afford much opportunity for commenting on any general principles belonging to the points raised.

The questions turned on a marriage settlement by which 10,000*l.* was to be raised, under the trusts of a term of 500 years, out of estates some of which were situated in England and the rest in Ireland, for the portions of the younger children of the marriage. The trustees of the term were to raise out of the rents of the estate such yearly sum as should be equal to interest at 5*l.* per cent. on the portions of the younger children for their maintenance until their portions should become payable. All the parties to the settlement resided in Ireland, and the deed was executed there. Although the 10,000*l.* had become payable many years back, part of it still remained to be raised, and one object of the suit was to have the remainder raised, together with the arrears of interest thereon ; and as the settlement contained no directions as to the rate of interest which the 10,000*l.* was to bear *after it had become payable*, one question in the cause was, whether the remainder of that sum was to be raised with Irish interest at 6*l.* per cent. or with interest at 5*l.* per cent. (the rate provided by the settlement for it to bear before it became payable)<sup>2</sup>, or at 4*l.* per cent. according to the usual course of the Court.

<sup>1</sup> Since the above was written we have been informed that the case has been argued at law, and that the Court declined to follow for the purposes of the present question the authority of *Hall v. Smith*. If this is the case, it is to be presumed that the decision of Sir G. Rose will be confirmed by the Lord Chancellor.

<sup>2</sup> The report says "or with English interest at 5 per cent.;" but it is appre-

It was admitted that the principal was to be raised in Irish currency, according to *Saunders v. Drake*<sup>1</sup>, where Lord Hardwicke says, that if a bond be given at Dublin, or a note at Jamaica, it must be paid in current money.

With regard to the interest, it was argued for the highest rate, that interest is regulated by the law of the country in which the contract or security is made. That the settlement directed interest to be raised at 5*l.* per cent. for the maintenance of the children before their portions became due, and that it is usual to allow something less for maintenance than is payable for interest. On the other side it was urged, that where a foreign contract is sought to be enforced in an English court, it must be enforced according to the course of that Court, and that the *lex loci contractus* did not apply to such a case. This latter view was concurred in by the Vice-Chancellor of England, who held that, there being nothing in the way of contract in the case to shew after which rate the interest was to be paid, he could only give it according to the usual course of the Court, that is, at 4*l.* per cent.

ELLISON v. ELWIN. 13 Sim. 309.

*Assignment by Husband of Wife's Chose in action when not reversionary.*

One of the best known, and perhaps not one of the least important, of the principles resulting from the modern decisions of Equity jurisprudence is that established by Sir Thomas Plumer, after repeated discussions, in the case of *Purdew v. Jackson*<sup>2</sup>, and followed by Lord Chancellor Lyndhurst in *Honner v. Morton*.<sup>3</sup> It is almost superfluous, after the mention of these cases, to say that we refer to the principle "that all assignments made by the husband of the wife's outstanding personal chattel which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy or under the Insolvent Act, or to a purchaser for valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by survivorship."

Of the circumstances of the present cases, which were of a rather special and complicated nature, it does not appear necessary to enter into any statement in this place, farther than to say that the case attempted to be made in arguments upon a portion of them, was, that Sir Thomas Plumer did not decide, and did not intend to decide, any thing except as to a reversionary interest, and that a

hended that 4 per cent. being the rate of English interest recognised by the Court, the suggestion of 5 per cent. (if, indeed, such a suggestion was made by any of the parties, which appears rather doubtful), could only have been grounded upon this mention of it in the settlement.

<sup>1</sup> 2 Atk. 465.

<sup>2</sup> 1 Russ. 1.

<sup>3</sup> 3 Russ. 65.

passage in Lord Lyndhurst's judgment shewed that he did not mean to extend the doctrine to cases where the chose in action either was capable of being reduced into possession at the time of the assignment or became so during the coverture; and that a fact which was taken for granted in the argument of *Purdew v. Jackson*, that no case had occurred in which the husband having assigned the wife's present chose in action, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife, was not strictly correct.

The Vice-Chancellor of England, however, pronounces it "useless to be always travelling over the same ground. I consider the principle laid down by Sir Thomas Plumer, and twice affirmed by the Lord Chancellor, to be decisive of the present question. Whether the husband dies in the lifetime of the tenant for life, whereby the chose in action cannot, as against the wife, be reduced into possession, or whether he survives and dies before it is reduced into possession, the same result must in my opinion follow."

This decision was adopted by the Vice-Chancellor Knight Bruce in the case of

**ASHBY v. ASHBY. 1 Coll. 553.**

This second case was as follows: — The wife being entitled to a legacy of 80*l.* after the death of her mother, by an indenture made between the husband and wife of the one part, and S. C. of the other part, the former assigned the legacy of 80*l.* to S. C. by way of mortgage for securing the sum of 30*l.* and interest. S. C. afterwards, in consideration of natural love and affection, absolutely assigned the legacy or sum of 80*l.* and interest and the benefit of the mortgage to R. C., his grandson. The husband survived his wife's mother more than twelve months, but took no steps to reduce the property into possession. R. C. claimed the benefit of the assignment. It was not attempted to distinguish this case from the preceding<sup>1</sup>, but it was submitted that that case was not in accordance with the doctrines of the Court. The Vice-Chancellor, however, pronounced that it warranted him in acting upon his own opinion, which agreed with that decision, in the present instance, and that finding that case before him, without considering it necessary to enter upon a discussion of decisions and dicta in other cases, he should follow it.

**WHITMARSH v. ROBERTSON. 1 Coll. 571.**

*Husband and Wife. — Feme Covert. — Power.*

This case, though of rather a special nature, may be briefly

<sup>1</sup> As reported in 12 Law J. 440. and 7 Jur. 337., under the name of *Elwen v. Williams*.

referred to in connection with the two preceding. By a marriage settlement, stock in the funds was settled upon the intended husband and wife for their joint lives and the life of the survivor, and then upon the children of the marriage, with a power to trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. The husband died. The wife married again. The second husband assigned the wife's life interest for valuable consideration, the wife joining. After the assignment, the wife, by a deed poll in pursuance and execution of the power, "consented, directed, appointed, and requested" that the trustees should forthwith raise out of the stock a sum named in the deed poll, or such other less sum as they should think proper, and should apply the sum so to be raised for the advancement and benefit of the children. The trustees declining, under the circumstances, to act without the direction of the Court, a petition was presented praying a declaration that notwithstanding the second marriage and the assignment by the second husband, the power given to the wife by her former marriage settlement was a valid and subsisting power and well executed by the deed poll. The Vice-Chancellor in substance acceded to the prayer; holding that the wife's life interest, being derived under a particular instrument, must be liable to all the provisions affecting it contained in that instrument; that if the assignment had not been made, she could certainly have executed the power, as it was a power with which marriage did not interfere, and that a purchaser from the husband could in reference to this stand in no better situation than the husband himself. Also, that the wife's concurrence in the sale could make no difference, being done neither in respect of estate settled to her separate use nor in the exercise of a power given to her, and therefore being in fact simply nugatory.

BARRY v. HARDING. 1 Jones and Latouche, 479.

*Ademption.*

One very important point in the doctrine of ademption of legacies by subsequent advancements has, as is well known, been placed in an entirely new light within a few years. It had been considered settled by the various cases in which the doctrine had been discussed, that where the portion subsequently advanced by a parent, or a person *in loco parentis*, was to be treated as an ademption of the legacy previously bequeathed by him, it was an ademption *in toto*, and that, to use the words of Lord Hardwicke<sup>1</sup>, "whether the portion given in the lifetime is less or not is no ways material."

<sup>1</sup> In *Shudal v. Jekyll*, 2 Atk. 516.

The subject, however, being very elaborately reviewed and discussed in the case of *Pym v. Lockyer*<sup>1</sup>, Lord Chancellor Cottenham came to the conclusion that although the rule was "generally received in the profession, and laid down in all the text-books, and apparently founded upon the highest authority," all reasoning and analogy were against it, and that, on a thorough examination of the authorities, they were not such as to make it his duty to act upon it. Consequently it is now settled that the subsequent advancement by a parent, or a person *in loco parentis*, of a portion less than the testamentary portion operates only as an ademption *pro tanto*.<sup>2</sup>

We have thought it worth while to refer here to this important decision, but the question in the present case was of a different nature. A father bequeathed to one of his daughters 2000*l.*, and appointed her his residuary legatee. The daughter subsequently married, and by a settlement to which she and her father and her intended husband were parties, after reciting that the father had agreed to give his daughter 2000*l.* for a marriage portion, certain sums of money were vested in a trustee for the benefit of the intended husband and wife and the issue of the marriage. It was contended, that as under these the wife only took a reversionary interest in 1000*l.* contingent on the event of her surviving her husband, while the 2000*l.* was given to her by the will absolutely, it was not a case of substitution; but the Lord Chancellor of Ireland says, "I do not see how the argument can be used in a case like the present, where a parent having made a will bequeathing a certain sum to his child takes upon himself to make a settlement of a like sum to her upon her marriage. When a testator has taken upon himself to make a settlement by his will of the portion he intends for his daughter, as was the case in *Booker v. Allen*<sup>3</sup>, and then, upon her marriage, gives her a different sum, and settles it in a different manner, a question may arise whether the portion given on the marriage is an ademption of that given by the will. That is not the case here . . . . Unless, therefore, some authority to the contrary be produced, I shall hold that where a father

<sup>1</sup> 5 M. & C. 29.

<sup>2</sup> The reasoning of Lord Cottenham's judgment seems only to apply to those cases where the testamentary gift is a portion properly so called, that is, where the testator is "dividing his property among his children . . . attributing to each the share of the whole which, with reference to the wants of all, each ought to possess." There are some cases where a person putting himself *in loco parentis* has bequeathed a legacy expressly for a particular purpose, such as outfit, &c., and in which the fulfilment of that particular purpose by a subsequent advancement of smaller amount would seem still to operate as a total ademption.

<sup>3</sup> 2 Russ. & Myl. 270.

makes an absolute gift by his will to his child, and afterwards, upon the marriage of that child, settles a like sum upon the husband and wife and their children, the provision by the settlement is an ademption of the legacy."

SHERIDAN v. JOYCE. 1 Jones and Latouche, 401.

*Notice ex post facto. — Trust raised by Assent.*

Without going fully into the matter of this case, we may state in a few words enough to render intelligible some observations occurring in the judgment of the Lord Chancellor of Ireland, which appear of considerable general importance.

On the occasion of a marriage, a sum of money belonging to the proposed wife was vested in two trustees. One of them, Joyce, alone acted. There was no power to lend the money on personal security, but Joyce lent it to Fair, a person with whom he had dealings on his own account, and Fair had no notice at the time of its not being Joyce's own property. The first trust of the money being for the separate use of the wife, she, on finding it had been lent at interest to Fair, wrote to him requesting him not to pay Joyce the money that belonged to her, saying she would prefer that the interest should be paid to herself directly. In reply, Fair stated his willingness to accede to her desire, and adds that he will take care to hold the money for her. Afterwards, however, Joyce taking some steps to enforce against Fair securities which he held from the latter on account of the various transactions between them, Fair repaid the amount to Joyce.

The Lord Chancellor. "The moment Fair became aware that this was trust money, he became a trustee of it. He did not dispute the trust, or call for a particular statement of it, but he became aware that Joyce had committed a breach of trust in lending him the money as his own, whereas it was trust money, and he in fact acted in the trust with the concurrence of Joyce, for he paid interest on the money for three years directly to Mrs. S. herself, thereby admitting the trust, and that he had become a trustee by thus acquiring, through the improper conduct of Joyce, the trust money which ought not to have been lent to him . . . Fair knew that this was trust money. He had promised that he would not part with it; was there any pressure or any dealing to justify him in paying it over? Am I to allow a person who had become a trustee to pay the money over to the legal hand, who had committed a breach of trust in respect of that money, and that by bills at three and six months? . . . I think this transaction was a juggle between the parties to deceive this lady and help themselves to her property."



Ex parte MAGNUS. 3 M. D. &amp; D. 693.

*Compromise of Suits by Assignees.*

In this case there were two petitions, one by a creditor praying that the assignees might be restrained from proceeding to adopt or carry into effect the terms of a proposed compromise of nine Chancery suits instituted on behalf of the bankrupt's estate, the other by the assignees, praying that the compromise might be carried into effect.

The only question decided on the petitions was as to the insufficiency of the advertisement summoning the meeting at which the resolutions in favour of the compromise had been agreed to; but we notice the case for the purpose of drawing attention to a principle adverted to by the Chief Judge, who throws out a doubt whether, supposing the advertisement to have been regular and sufficient, there was "any case in which the Court had interfered at the instance of a creditor to set aside a compromise on the ground simply of its being an imprudent agreement, where no fraud is suggested."

PERKINS v. DEPTFORD PIER COMPANY. 13 Sim. 277.

*Debenture Creditors. — Mortgage of Tolls.*

This case may be noticed more on account of the general interest of the subject-matter in the present times than for any other reason.

The defendants were furnished by their act of parliament with the usual provision empowering them to raise a sum in addition to their share capital, to be secured by mortgage of the tolls, rates, and duties to be received under the act. The plaintiffs were persons to whom the company had made mortgages of the tolls in, pursuance of the act.

Two creditors of the company, who had no security on the tolls, but one of whom had a mortgage on the land, recovered judgment in actions against the company (which the latter did not defend) for the debts due to them. Whereupon the debenture creditors filed a bill against them and the company, alleging that the plaintiffs in the actions intended to sue out elegits on their judgments, and praying that they, the debenture creditors, might be declared the first incumbrancers upon such of the lands as had been conveyed to the company, and to have an equitable lien, subject to the mortgage, on such of them as had been conveyed to the mortgagee, and for an injunction and receiver.

A demurrer by the mortgagee of the land for want of equity was allowed.

The Vice-Chancellor of England. "If the plaintiffs really meant to have a security on the lands of the company, they might have had it; but they file a bill *because they have a lien on the tolls*, and they say that there cannot be any tolls if there is no land; and these persons who first of all bethought themselves of taking a mortgage on the land may, by taking the land, prevent the raising of the tolls. But suppose they do, they will be only using the powers which they lawfully may use."

JUNCTION RAILWAY COMPANY v. CLARENCE RAILWAY COMPANY.  
1 Coll. 507.

*Mandatory Injunction. — Interference of Equity to give Possession of Easement not previously enjoyed.*

The details of this case are very long, and it will therefore be expedient not to attempt in this place to enter into the matter of them completely, but merely to state the points finally raised, and the determinations upon them.

The ultimate case made was, that the plaintiffs, whose railway was to cross over that of the defendants at a certain point by means of a bridge, had, by the provisions of their Act of Parliament, a right of temporarily entering upon and making use of the slopes of the defendants' railway, at the point of crossing, for the purpose of executing the works of the bridge, the foundations of which, however, were not intended, when finished, to rest on any portion of the defendants' land. The defendants, however, on certain alleged grounds, affected to contest this right, and resorted to various means of obstruction which entirely impeded the plaintiffs from commencing the works. Among other things they built two substantial walls by the sides of their own railway, and across the line of the intended bridge, extending to a considerable height above its proposed level. They also filed a bill, praying an injunction restraining the plaintiffs from building their bridge until the grounds on which they professed to contest their right to do so had been adjudicated on by this Court. On the motion for that injunction a case was ordered to be stated for the opinion of the Court of Exchequer as to the validity and relevancy of the objections professed to be made. No steps, however, were taken to proceed with that case, and the plaintiffs afterwards filed the present bill, praying an injunction to restrain the defendants from continuing the obstructions referred to, and from continuing to maintain and uphold the walls which they had built, and from interfering with the works about to be commenced by the plaintiffs. On the motion for this injunction it was conceded that it would in effect be mandatory, but it was contended that, under the authority of *Robinson v. Lord*

Byron<sup>1</sup> and other cases, that circumstance constituted no objection, and that the Act of Parliament having given the plaintiffs a right to build the bridge without the consent of the defendants, the plaintiffs were entitled to all things necessary for the enjoyment of that right, and therefore entitled to the easement of going temporarily upon the defendants' land for the purpose of building the bridge. The Vice-Chancellor expressed himself satisfied that the defendants' objections to the plaintiffs' legal right were entirely untenable; but that still as the legal right was contested, and the plaintiffs had never been in possession of any parts of the easements they claimed, he thought that, as the granting of the proposed injunction *would be going to a greater extent than the Court had ever hitherto gone*, and in effect be taking what might be deemed a new step of some importance, it would be safer and better that the step should be taken, if at all, by the head of the Court. He therefore directed the motion to stand over in order that an application might be made to the Lord Chancellor to hear it.

In consequence of these observations the plaintiffs applied to the Lord Chancellor, when his Lordship recommended the parties to proceed to law. A case was accordingly stated for the opinion of the Court of Exchequer, which pronounced the grounds on which the defendants disputed the plaintiffs' legal right untenable, after which an injunction was granted in (nearly) the terms of the prayer of the bill.

**BURBOUGHS v. M'CREIGHT.** 1 Jones & Latouche, 290.

*Statute of Limitations, 2 & 3 W. 4. c. 27. — Tenants in Common. — Trusts.*

In this case lands were conveyed to a trustee and his heirs in trust for five persons as tenants in common in fee. The trustee never in any manner interfered in the trust, and for more than twenty years prior to the filing of the bill, four of the tenants in common had been by their agent in the uninterrupted and exclusive receipt and enjoyment of the rents and profits of all the lands. The fifth now claiming his share of the lands, the others relied upon the statute.

For the plaintiff it was argued, that this was a case in which the lands were held upon an express trust, and there having been no conveyance to a purchaser for valuable consideration, from which the period of twenty years could begin to run, it came within the saving of the twenty-fifth section of the above Act; also, that although the twelfth section had done away with the old rule, that

<sup>1</sup> 1 B. C. C. 588.

the possession of one tenant in common is the possession of the others, it did not render such possession adverse.

It was held, however, that the statute had rendered actual possession by enjoyment of the profits of the lands, though not adverse in the old sense of the law, in itself a bar and a transfer of the estate, and that although "a trustee remaining in possession never acquires possession adverse, within the meaning of the Act, to the title of his *cestuique trust*, and if he convey to any one, not for value, the same result follows," yet here the trustees never having executed their trust, and the defendants not having acquired any estate from them, the saving of the twenty-fifth section did not apply, and the plaintiff's bill must therefore be dismissed with costs.

In re O'BIERNE. 1 Jones & Latouche, 353.

*Construction of Failure of Issue under the Wills Act.*

The Wills Act<sup>1</sup> by its twenty-ninth section provides that in any devise or bequest of real or personal estate, words which may import either a want or failure of issue of any person at the time of his death, or an indefinite failure of issue, shall be construed in the first of the two senses, unless a contrary intention shall appear by the will, first, by reason of such person having a prior estate tail, or secondly, of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or thirdly, otherwise.

In the present case the testator bequeathed the residue of his property "to my brothers John and James to be divided equally, with a request to John, that should he die without lawful issue the property which I bequeath him shall revert back to my nephews, sons of my brother James, provided they are prudent and well conducted."

It being held clear that these words of request were imperative, it was attempted to be contended in favour of John taking an absolute interest in the personalty, that the Court could not infer the intention of the testator, without looking at the words of the bequest over, and that those words would, independently of the Statute of Wills have given an estate tail in real estate, and consequently an absolute interest in personalty.

The Court, however, pronounced that as John would not take an estate tail, unless by implication from those very words, the case did not come within any of the exceptions of the clause, and that consequently the rule of construction laid down by it clearly applied.

<sup>1</sup> 1 Vict. c. 26.

TALBOT V. FORD. 13 Sim. 173.

*Inequitable Contract. — Refusal to enforce Hard Bargain.*

A principle was laid down by the Vice-Chancellor of England in a case brought before him for adjudication in the year 1836, and reported under the name of *Kimberly v. Jennings*<sup>1</sup>, that the remedies of courts of equity will not be granted for the enforcement of such contracts as are commonly termed "hard bargains."

The circumstances of the present case, in which it was recognised and applied, were as follows :—The plaintiff was the lessor of mines, one of the defendants the lessee ; the lease contained a covenant on the part of the lessee, allowing the lessor *at any time* before the determination of the lease, upon giving notice, to take at a valuation all or any part of the mining machinery belonging to the lessee. The lessee during the continuance of the lease assigned the machinery, as a security for money lent to him by the other defendant, with a power of sale. The assignee being about to sell under this power the lessor served the lessee with notice of his desire to take the machinery under the covenant, and then filed a bill praying specific performance of the covenant, and an injunction to restrain the lessee from selling or removing the articles. On the motion for the injunction, the Vice-Chancellor, after remarking that it is not unusual to insert in leases of mines a covenant which enables the lessor to purchase machinery and other articles belonging to the lessee, and used in working the mines, *shortly* before the expiration of the lease, but that the present covenant was such as to enable the lessor to defeat, to a considerable extent at least, the object and intention of the lessee in taking the lease, proceeds :— " It seems to me that it was by mere want of caution that this covenant was worded as it is, for I cannot suppose that the parties could have intended that it should be expressed in the unqualified terms in which we find it. But, be that as it may, my opinion is that it is so injurious and oppressive to the lessee that the Court ought not to interfere for the purpose of giving effect to it." He therefore refused the injunction.

STOCKTON RAILWAY COMPANY V. BARRETT. 11 Cl. & Fin. 590.

*Construction of Railway Acts.*

This case turned entirely on the construction of a number of minute points in the various Acts regulating the undertaking of the appellants, of no sort of general interest, and probably scarcely illustrating even any other cases of the same class. We notice it

<sup>1</sup> 9 Sim. 340.

merely for the sake of a principle incidentally laid down by one of the Peers in delivering his opinion, that "clauses in Acts empowering companies to levy a charge upon the public must, where the meaning is doubtful, be construed favourably for the public."

Lord Brougham. "It must be observed that *in dubio* you are always to lean against the construction which imposes a burthen on the subject. The meaning of the legislature to tax him must be clear . . . it is incumbent upon the company to take care that their Act of Parliament is made clear and undoubtful, especially upon those clauses by which the company seeks to impose a burthen upon the public; and if companies do not choose to take the trouble to do that, let them abide the consequences; they will not be able to levy the duty."

BARNED v. LAING. 13 Sim. 255.

*Ne Exeat* — Rule as to praying for it by the Bill.

Although this case only relates to a point of practice, yet the point being one on which there is a previously published decision which may have a tendency to mislead, and on which it is believed that, either owing to that or some other cause, a wrong impression rather generally prevails, it has been thought worth while briefly to notice it.

In the case referred to<sup>1</sup>, the report states that "the Vice-Chancellor said he could not grant the writ unless it was prayed for by the bill," and that he suggested, that when acts were done by the defendant, after the filing of the bill, shewing his intention to leave the kingdom, a supplemental bill must be filed for the purpose of stating them and praying for the *ne exeat*.

In consequence of this a motion was made in the present case to discharge a *ne exeat* which had been obtained without being prayed either by the original or by a supplemental bill. The attention of the Court, however, being drawn more fully to the authorities on the subject, the Vice-Chancellor refused the motion; but, on the ground that what he said in *Sharp v. Taylor* was stated "in a general way," and might have tended in some measure to mislead those who advised the motion, he refused it without costs.

LLOYD v. MASON. 4 Hare, 132.

*Solicitor's Lien.*

It is not very material to enter into any statement of the particular circumstances of this case, which were of an ordinary nature. The points raised and decided in it were:—

<sup>1</sup> *Sharp v. Taylor*, 11 Sim. 50.

That the stat. 1 & 2 Vict. c. 110. ss. 16. 18. does not deprive a solicitor, who has attached his client for non-payment of costs, of his lien upon the fund which the solicitor has recovered.

That an attachment of the client for the non-payment of costs is not a waiver of the lien of the solicitor on the fund which he has recovered in the writ in which the costs were incurred.

That the solicitor, after the death of his client, retains his lien on the fund which he has recovered, and is not left merely to his rights as a general creditor of the estate of the client.

That the lien of the solicitor on the fund is not impeded by the fact that the order of the Court directs the fund to be paid to the client without reserving the right of the solicitor.

DAWSON V. CHAMNEY. 5 Q. B. 164.

*Innkeeper. — Negligence. — Presumption.*

The common law regarding innkeepers renders them answerable for the safety of goods and chattels brought to their houses by guests, provided the loss or injury arise from the negligence or misconduct of the innkeeper or his servants. But as there might be great difficulty in proving a default of this nature, it is held that the loss or damage of goods, while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his servants: and in an action for the value of goods damaged or lost under such circumstances, the onus lies upon the innkeeper to shew that he exercised all needful management and precaution. In the present case the plaintiff's horse was brought to the defendant's inn on the Penrith market-day. The plaintiff gave the horse in charge to the ostler, who placed him in a stall with another horse, which kicked the plaintiff's horse, and occasioned the injury in question. The defendant called witnesses to shew that proper care had been taken of the horse, and Mr. Justice Maule told the jury to find for the plaintiff if they were of opinion that the defendant, by himself or his servants, had been guilty of direct injury or of negligence, but, if otherwise, for the defendant. The verdict was for the defendant, and a motion for a new trial having been made, on the ground of misdirection, the Court of Queen's Bench held that the learned judge had properly left the case to the jury. Lord Denman C. J. "In the present case, when the plaintiff had closed his evidence, the learned Judge thought that there was a presumption of negligence, and called on the defendant for his answer, which was given by proof of such attention and skilful management, as to convince the jury that the damage could not have been

occasioned by the negligence imputed. That proof took away the ground of action, according to all the authorities.”<sup>1</sup>

STEAD v. WILLIAMS. 8 Scott N. C. 684.

*Patent. — First Inventor.*

Among other incidents to a patent right, it is necessary that the art or process to which the patent relates should not have been promulgated before the date of the letters patent: otherwise the patentee is not considered the first inventor. In the case of the Househill Company v. Neilson<sup>2</sup>, Lord Lyndhurst C. observed:— “If the machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been actually worked, is not that an answer to the patent? It is continually the practice on trials for patents to read out of printed works, without reference to any thing that has been done.” And Lord Brougham, with reference to the same point, said: “It negatives being the true and first inventor, which is as good as negating the non-user. The book that is generally referred to, is the ‘Repertory of Arts and Sciences’: it must not be a foreign book, but published in England.” In accordance with this rule, Sir David Brewster’s patent for the Kaleidoscope was avoided, because he had previously published an account of it in a book. The present case is a further illustration of the same doctrine. The plaintiff Stead, in 1838, obtained letters patent for paving public streets with blocks of wood of similar sizes or dimensions. The defendants, who represented the Metropolitan Patent Wood Paving Company, laid down pavement in the streets of Manchester, composed of hexagonal blocks of wood, similar in size and character to those described in the plaintiff’s specification; and upon an action for the infringement of the plaintiff’s patent, the defendants pleaded that the plaintiff was not the first and true inventor of the pavement mentioned in his specification. In support of this plea evidence was given of a letter addressed by Mr. Finlayson to the editor of the London Journal of Arts in 1825, and two letters addressed by Mr. Heard to the Secretary of the Society of Arts in 1833. The publication and extensive circulation of these letters was also proved. At the trial the jury found a verdict for the plaintiff: but on the ground that the summing up of the learned Judge did not present the entire view of the case to the consideration of the jury, the Court of Common Pleas ordered a new trial. Tindal C. J.: “We think if the invention has already

<sup>1</sup> See Calye’s Case, 8 Rep. 32 a., and the same case with the notes in Smith’s Leading Cases. And see Story’s Bailments, 306. Ed. London, 1839.

<sup>2</sup> 1 Webster, 718. n.



been made public in England by a description contained in a work, whether written or printed, which has been publicly circulated, in such case the patentee is not the first and true inventor within the meaning of the statute (21 Jac. 1. c. 3.), whether he has himself borrowed his invention from such publication or not; because, we think, the public cannot be precluded from the right of using such information as they were already possessed of at the time of the patent granted. It is obvious that the application of this principle must depend upon the particular circumstances which are brought to bear on each particular case. The existence of a single copy of a work, though printed, brought from a depository where it has been long kept in a state of obscurity, would afford a very different inference from the production of an Encyclopædia or other work in general circulation. The question will be, whether, upon the whole evidence, there has been such a publication as to make the description a part of the public stock of information."

RAMIRE v. IRVINE. 8 Scott N. C. 684.

*Restraint of Trade.*

The principle upon which the law, in cases of the sale of a goodwill, upholds a covenant restraining the vendor from carrying on the same business within certain limits, is founded on the necessity of securing to the vendee the enjoyment of that which he has purchased. If such a covenant were not enforced, nothing could prevent the assignor of a goodwill from soliciting and getting back his customers, and using for his own profit the very thing which he has agreed to sell. At the same time any restriction, going beyond the limit which is effectual for the security of the vendee, is deemed an unreasonable restraint of trade, and void on principles of public policy, which favours trade and competition, not for the sake of the trader, but for that of the consumer. These doctrines have been established by a long series of cases, extending from *Hunlocke v. Blacklow*<sup>1</sup> to *Mallan v. May*.<sup>2</sup> In the case now before us the question arose, whether the restraint was unreasonable on account of its extent and possible consequences. Upon the assignment by the defendant (who was a baker) of the lease of his shop and the goodwill of his business, he covenanted that he would not set up or carry on directly or indirectly, during the term of fourteen years, the business of a baker within one mile of the said premises, under the payment of the sum of 200*l.*, to be sued for and recovered by way of liquidated damages, for each and every month in which the defendant should commit any breach of the last-men-

<sup>1</sup> 2 Saund. 156.

<sup>2</sup> 11 M. & W. 653.

tioned agreement; and also, that he would not, during the said term, solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the said premises without the consent of the plaintiff, under the penalty of 200*l.*, as liquidated damages for each infraction. The defendant subsequently supplied bread to certain of his old customers named in the declaration: and upon an action being brought against him for these breaches of the agreement, he demurred, on the ground that the agreement was contrary to public policy, and illegal, in this respect, that it restrained him from supplying bread and flour to particular persons, wherever they might reside, without limit in point of space as to those persons, and under all circumstances, whether they changed their residences, or continued customers of the plaintiff or not, and that such restraint was larger and wider than the protection of the plaintiff could possibly require. In support of the demurrer, it was argued that the customers might remove from the plaintiff's neighbourhood, and go to a distant part of the country, where the defendant might be the only baker, and yet this agreement would preclude him from supplying them. Tindal C. J. "With respect to the first part of the agreement, that the defendant would not directly or indirectly set up or carry on, during the term, the business of a baker, within one mile of the premises disposed of, that clearly is within the rule that is admitted to be sanctioned by all the cases. But it is insisted that the latter part of the agreement, whereby the defendant engages that he will not, &c., is such a restraint upon his right to trade as renders the agreement contrary to public policy, and therefore void. In the first place it is to be observed, that this is not a general restraint of trade, but only restrains the defendant from trading with a very limited number of persons, whose names were known to the defendant at the time he entered into the contract; and that would not carry the case any further than the first part of the agreement, provided the customers continued to reside in the same place. But it is argued that the customers may wander into another district, and that this contract would restrain the defendant from supplying them with bread and flour, whithersoever they might go; and it might be that they could obtain so necessary an article from no one else. If, however, we see that the contract is a reasonable one at the time it is entered into, we are not bound to regard such improbable and extravagant contingencies." Maule J. "If we are to give the contract a reasonable construction, such reasonable construction would probably exclude the somewhat exaggerated case that has been put, of this baker and some of his old customers becoming the sole inhabitants

of some wilderness, where bread would be procurable only from him. The possibility of some such extravagant case happening does not make unreasonable a restriction that is otherwise a reasonable and just one."

FRANKLIN v. NEATE. 13 Mees. & W. 481

*Pawnor and Pawnee.*

It is a general rule that the pawnor of a chattel retains a qualified property in the article: and in Mr. Justice Story's work on "Bailments<sup>1</sup>," it is laid down, that "subject to the rights of the pledgee the owner has a right to sell or assign his property in the pawn: and in such a case the vendee will be substituted for the pledger, and the pledgee will be bound to redeem, and to account to him for the pledge and its proceeds. If he refuses, an action at law will lie for damages, as well as a bill in Equity to compel a redemption and account." In the present case, one Gilbert pawned a chronometer to Neate under a written agreement, stating that it was as a collateral security for 15*l.* and interest; and that in case Gilbert did not redeem within twelve months, Neate should be at liberty to sell it, and repay himself principal and interest. Franklin bought the chronometer of Gilbert, while it was in Neate's hands, after the expiration of the year. He then tendered to Neate the amount due: and on Neate's refusal to deliver the chronometer, brought the present action of trover. The defendant contended that no property passed to the plaintiff by the sale; that it was merely an assignment of a right of action with an equity of redemption; and at the trial the learned Judge directed the jury to find a verdict for the defendant, giving leave to the plaintiff to move to enter a verdict for him for the sum of 19*l.* 10*s.* The case was accordingly argued before the full Court: and judgment was delivered by Rolfe B. "There is very little to be found in the books on the subject of the right of a pawnor over the chattel pawned: but this is very clear, that, notwithstanding the pawn, the pawnor still retains a qualified property; and in the absence of direct authority on the point, this seems to us decisive in favour of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto. The case was argued for the defendant, as if what this pawnor transferred or sought to transfer was a mere right of action. But this is not so: we transfer the property in the chattel, qualified indeed by the right existing in the pawnee, but still a right of property; and the right of action afterwards

<sup>1</sup> Page 377.

exists in the purchaser, not in consequence of its having been transferred to him by the original pawnor, but by reason of the pawnee having wrongfully converted to his own use that which by the sale became the property of the purchaser. . . . That in ordinary cases of bailment, not by way of pawn, the bailor may sell is a proposition admitting of no doubt. Indeed it is assumed to be law by Lord Holt in *Rich v. Aldred*.<sup>1</sup> With so little, then, of direct authority, we must act on the general principle that a pawnor, like every other bailor, retains his property in the goods pawned, subject only to the qualified property transferred to the pawnee; — that, as an incident to such property, he has the right of sale: and that after the sale the purchaser has the same interest in the chattel which the pawnor had. The rule must, therefore, be made absolute.”

STALWORTH v. SIMS. 13 Mees. & W. 466.

*Joint Arbitrators. — Signature of Award.*

The point in this case was, whether or not an award should be set aside because it had not been executed by the two arbitrators in the presence of each other. *Per curiam*. “We are strongly disposed to think that the signing of an award by joint arbitrators ought, like all other judicial acts, to take place in the presence of each other; but we give no final opinion on the point. At the same time we are not disposed to make this rule absolute for setting aside the award: on the other hand, we shall not grant any attachment or rule for payment of money under the award. If an action be brought, the question may be decided on appeal to a court of error. Probably, when this strong intimation of opinion of the Court is made known to joint arbitrators, they will take care not to make awards except in the presence of each other.” Rule refused.

DAVIDSON v. COOPER. 13 Mees & W. 343.

*Alteration of Instrument after Execution.*

This was an action on a guarantee, and the defence was that after the instrument had been signed, and while it was in the plaintiff's hands, it was, without the defendant's knowledge, altered by some person unknown to him, in a material particular, by affixing two seals by and near to the signatures, so as to cause the guarantee to purport to have been sealed by the guarantors, and to be their *deed*. This plea was found by the jury to be true, and was decided by the Court of Exchequer to be a good defence. The case now came before the Exchequer Chamber upon a writ of

<sup>1</sup> 6 Mod. 216.

error; and the substantial point seemed to be whether the case should be governed by the second resolution in Pigot's case<sup>1</sup>, which was contended to be applicable to deeds only. It is as follows: "Secondly it was resolved that when any deed is altered in a *point material* by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, razing, or by the drawing of a pen through a line or through the midst of any material word, that the deed thereby becomes void."

It was argued for the plaintiff in error that Pigot's case had been overruled in the Irish Courts in the case of Swiney v. Barry<sup>2</sup>, and that the decision in Texira v. Evans<sup>3</sup>, was opposed to it; but Cresswell J. observed that the latter case was overruled by Hibblewhite v. M'Morine.<sup>4</sup> Lord Denman C. J. "After much doubt we think the judgment right. The strictness of the rule on this subject, as laid down in Pigot's case, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important, for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration, except through fraud or laches on his part. To say that Pigot's case has been overruled is a mistake; on the contrary, it has been extended,—the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure, or interlineation, after execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth cannot be known from inspection, but would require to be established by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy, if the altered writing could be imposed on the contractor as

<sup>1</sup> 11 Co. 27.

<sup>2</sup> 1 Anstr. 228.

<sup>3</sup> Jones, 104.

<sup>4</sup> 6 Mees. & W. 200.

genuine. We are therefore of opinion, both upon principle and authority, that this judgment must be affirmed."

**MELANOTTE v. TEASDALE.** 13 Mees & W. 216.

*Evidence. — I. O. U. — Stamp.*

The defendant gave to the plaintiff an unstamped I. O. U. in these words, "1839. Nov. 11. I. O. U. forty-five pounds thirteen shillings which I borrowed of Mrs. Melanotte, and to pay her 5 per cent. till paid." Upon an objection at the trial that this document ought to have borne a stamp, Parke B. received the instrument in evidence, and the plaintiff obtained a verdict. The question respecting the stamp was afterwards argued before the full Court, and decided in favour of the plaintiff. Pollock C. B. "The doctrine that an I. O. U. simply does not require a stamp has been so long established, and so many instruments have been drawn upon the faith of it, that it must be considered settled law. It is a doctrine older than the last Stamp Act; and as that Act does not notice it, we may infer that the legislature did not mean the Act to apply to such documents. If, then, this paper had simply been 'I. O. U. 45*l*.' it would not require a stamp; nor would it if it had been 'I. O. U. 45*l*. which I borrowed of Mrs. Melanotte,' because that carries it no further than a mere acknowledgment. Then what, if anything, is the agreement contained in it? Only 'to pay 5*l*. per cent. till paid,' which is in fact mere surplusage. The only agreement therefore of which the paper is evidence is an agreement to pay 5*l*. per cent. interest on 45*l*., which is not necessarily of the value of 20*l*. It is not enough that the agreement should be possibly of that value; it must be so in its nature and inception. No stamp, therefore, was necessary in this case."

**MARSHALL v. LAMB.** 5 Q. B. 115.

*Bankruptcy. — Fraudulent Preference.*

In order to constitute a fraudulent preference, it is not necessary that the preferred creditor should obtain an exclusive advantage over the other creditors of the bankrupt, or that the bankrupt should intend to confer any such advantage on the particular creditor. Lord Mansfield C. J. in *Harman v. Fisher*<sup>1</sup> declared the rule to be, that the bankrupt "cannot take his estate out of that management which the law puts it into." In *Poland v. Glyn*<sup>2</sup> also, Abbott C. J. laid it down, that the object of the bankrupt laws was to divide the whole of the bankrupt's property equally among his

<sup>1</sup> Cowp. 123.

<sup>2</sup> 4 Bing 22, note.

creditors, and that if a tradesman found himself in such a situation that, in the judgment of any reasonable man, bankruptcy was inevitable, no voluntary payment by him could be good. In *Morgan v. Brundrett*<sup>1</sup> also, it was determined that the sole question was whether the payment was made in contemplation of bankruptcy, and that the intention of the bankrupt to benefit the creditor did not affect the validity or invalidity of the payment. The case now brought to the notice of our readers furnishes a new and remarkable illustration of the foregoing doctrines, inasmuch as the preferred creditor took no benefit at all by the preference; and yet the transaction was held void. The bankrupt had borrowed 700*l.* from the defendant on a mortgage of his wife's estate, and also of his sister's estate, and a policy of insurance belonging to the bankrupt himself. He covenanted in the usual form to pay the mortgage money; and when he was in desperate circumstances, after committing an act of bankruptcy, he took the money to the defendant, who at first declined to receive it as he had not had the usual notice, but on being paid the ensuing half year's interest, he took the money, and gave up the title deeds to the bankrupt. The assignee sued the mortgagee for the amount of the money so received by him, and they obtained a verdict, the propriety of which came under review in the Court of Queen's Bench, when a rule for a nonsuit or a new trial was discharged; that Court being clearly of opinion, that, although the creditor was in nowise benefited, as he gave up the deeds on receiving the money, yet he was a party *preferred* at the expense of the estate; and that the ulterior object could make no difference in the application of the law. Lord Denman C. J. "If the property in mortgage had belonged to the bankrupt, the payment by him would not have been a fraudulent preference, because the assignees would have had the mortgaged property; and it is indifferent to them whether they have the property free from the mortgage (supposing it to exceed in value the amount of the mortgage), or the property subject to the mortgage and the amount of the mortgage money in cash; but here the property, except the policy, belonged to others. Yet the defendant was a creditor of the bankrupt, because the money was lent to him, and he covenanted to repay it. The payment, therefore, was emphatically a payment of the bankrupt's debt, in order to release the property of his friends, which they had mortgaged for his benefit; and the defendant did receive twenty shillings in the pound out of the bankrupt's estate, to the prejudice of other creditors, *although it was no benefit to him*, for he would have

<sup>1</sup> 5 B. & Ad. 289.

been as well off, if he had kept the mortgage deeds. He is preferred, quoad the bankrupt's intention; and though the motive for giving that preference was ultimate advantage to the bankrupt and his own family, and not to the creditor, we think the preference fraudulent and the payment void.

**HARVEY v. WATSON.** 8 Scott N.C. 379.

*Pleading. — Separation Deed.*

This was an action for crim. con. with the plaintiff's wife, and on the part of the defendant a motion was made that, in addition to Not guilty, he might be at liberty to plead that "before and at the time of the committing of the trespass, the plaintiff had relinquished and renounced the comfort and fellowship of his wife, and had finally separated himself *by deed* from, and was living apart from her." Weedon v. Timbrell<sup>1</sup> was relied upon, where the Court of King's Bench held that no action can be brought for any act of adultery after a separation between husband and wife. [Tindal C.J. Does Weedon v. Trimbrell still remain a case?] A rule nisi was granted, and on cause being shown, the Court made the rule absolute. Tindal C.J. We ought not to interfere too rigorously with the defendant's right to put his defence upon the record. If there be any fair and reasonable doubt, the plaintiff should be left to demur. After the deliberate judgment of the Court of King's Bench in Weedon v. Timbrell, I think it would be too much to say this is so bad a plea that it ought not to be allowed.

**RORY v. GIBBON.** 4 Hare 65.

*Practice in Equity. — Payment into Court.*

This was a motion for payment into Court of the balance in an executor's hands, grounded on admissions in the answer, and resisted on the ground of want of sufficient distinctness in the admissions.

The Vice-Chancellor pronounced the practice of the Court now to be, that where a party charged himself with the *receipt* of a fund, he was bound by that charge until he had relieved himself from it by shewing a proper application of the money, and that it was not enough for a party whose duty it was to know the truth and be ready with information, to leave the application in doubt by merely expressing ignorance with regard to the charges to which the fund was liable. He therefore made an order for the payment into Court.

<sup>1</sup> 5 T. R. 357.



GALWAY v. GRAYDON. 1 Jones &amp; Latouche, 526.

*Practice in Equity. — Right to begin.*

This cause having been set down to be heard upon an objection for want of parties under the 47th Order of the Irish Court of Chancery, corresponding with Lord Cottenham's 39th Order of August, 1841, Lord Chancellor Sugden ruled that the party taking the objection had the right to begin, and that he would hear only one counsel on each side. We notice this decision because in *Bradstock v. Whatley*<sup>1</sup> Lord Langdale, M. R., was of the contrary opinion, holding that the plaintiff was entitled to begin the argument, and so ruled.

CURLING v. ROBERTSON. 8 Scott, N. C. 288.

*Practice at Common Law. — Costs.*

In this case the captain of a ship on the point of sailing had been examined upon interrogatories on the part of the defendant. At the trial the examination had not been used: but the defendant obtained a verdict. Upon the taxation of costs the Master disallowed the expenses of the examination, and the Court refused a rule requiring him to review his taxation on this ground, notwithstanding the practice of allowing the costs of an ordinary witness subpoenaed but not examined. Tindal C. J. "I have no doubt that you *bonâ fide* examined the witness, and that his examination was *bonâ fide* rejected by you: but I do not think the Master has done wrong in refusing you the costs of the experiment." Cresswell J. "You get the examination of this man by the compulsory process of the Court, and when you have obtained it, you find that it will not avail you. What right have you to charge this to the other side?"

<sup>1</sup> 6 Beav. 451.

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## VISCOUNT CANTERBURY.

THE sudden death of this learned and excellent person has occasioned much grief in the circles both of Parliament and the profession. He had for eighteen years filled the high office of Speaker of the Commons, and filled it with universal approval for his dignity, his impartiality, and his splendid hospitality, — filled it, too, in times of extreme excitement, and when the moderating powers of the Chair were in a peculiar manner required to be exercised; for he was Speaker when the great changes of the Reform Bill were introduced into the constitution of the House of Commons, and during the kind of crisis, almost revolution, which preceded the passing of that Act. When the Ministers resigned in Spring, 1832, on account of the opposition to the Bill in the Lords, Lord Canterbury was called upon to form a Government, but found the task impossible, and the Reform Ministry continued to govern the country.

In 1835 he was defeated as a candidate for again filling the Chair, by the Whig Opposition, although that party, while in office, had supported him as their Speaker after the Reform Bill was carried. In the untried state of being into which that great change threw the House, his temper, his firmness, his readiness, and his knowledge of business, were universally praised; and the determination of the Whig party, or rather their leader, was well justified, in preferring him to a friend of their own, who must have been wholly without experience to perform the difficult functions of Speaker.

Being born of a Tory family, and the son of an Archbishop, his principles were always those of the Conservative party; and on their regaining office, in 1835, when he was raised to the peerage, his appointment as Governor of Canada had been resolved on, but this was prevented by the change of ministry, 8th April, 1835, on the very day thirty years that Mr. Whitbread's celebrated resolution had been carried against Lord Melville by the casting vote of Lord Canterbury's predecessor. He remained out of office accordingly till his decease in July of the present year. But he took occasionally a useful part in the discussion of constitutional and parliamentary questions, although he resided a good deal at Paris with his family.

He was bred to the Bar, and attended the western circuit until he became Judge Advocate in 1808, and afterwards in 1817 he was raised to the Chair on Mr. Abbot's resignation. He was a sound and practical lawyer, and loved legal society, often attending the Bench at Lincoln's Inn, where he was a Bencher. He ever maintained the just privileges of Parliament, but was a firm enemy of their unjust and exaggerated assertion, and he deserves great praise for having obtained some relaxation of the pretensions, as absurd as they are mischievous, by which the Commons insist on certain Bills originating with them, and reject all amendments on money clauses, whereby the Lords are regularly left without any thing to do for the first half of each session, and overworked with business at the end, and whereby also a Bill containing any money clauses to which they cannot agree is necessarily thrown out for a whole year. Lord Canterbury was a man of high honour in public and in private life, of amiable disposition, and of undeviating sincerity as well as constancy in his friendships.

## POSTSCRIPT.

THE last quarter has been more than usually eventful in occurrences interesting to the profession. We can only glance at some of them. Besides the bills introduced by Lord Brougham on the 19th of May, noticed in this Number, we have also to draw the attention of our readers to the Documentary Evidence Act, the passing of which by the legislature has conferred no trifling benefit upon suitors. In our next Number we intend to point out the defects that are remedied by this statute, and to explain its general operation; suffice it, therefore, for the present to say, that the main object of the Act is to facilitate the formal proof of documentary evidence, and that it seeks to attain this object by enacting, that all public and official documents, which purport to be sealed with the authorised seal, or purport to be certified by the authorised officer, shall be received in evidence, without proof respectively of the seal, the signature, or the official character. A proviso is added, rendering it felony to forge or knowingly utter any such document with a false seal or signature appended thereto. This Act comes into operation on the 1st of November.

Lord Cottenham also introduced a bill for abolishing Ecclesiastical Courts, which passed the House of Lords, but was postponed by the Commons, on account of the lateness of the session. A similar fate attended the Charitable Trusts Bill, to which we adverted in our last Number. There can be no doubt, however, that both these measures will be renewed in the next session, and we believe that they will eventually become law.

Lord Campbell has also introduced a bill for the establishment of a General Registry. His Lordship, however, did not press it to a second reading, his sole object being, as we believe, to call attention to the subject. We trust, however, that early in the next session he will undertake it, and, in pursuing it, we are quite sure he will receive the cordial support of all law reformers. As the head of the Real Property Commission, the Bill (which was introduced as finally settled by the late Mr. Duval) cannot be in better hands. The profession is also awaiting with much expectation the three first volumes of the "Lives of the Lord Chancellors," from Lord Campbell's pen; which will be published, we are glad to hear, before November.

The commissioners appointed to revise and consolidate the Criminal Law, have, in pursuance of that branch of the commission under which they act, which directs them to inquire into and report separately respecting such statutes, and parts of statutes, relating to criminal matters as in their opinion ought to be repealed, presented a report recommending the repeal of a variety of statutes, and parts of statutes, which imposed penalties and disabilities in regard to religious opinions, and suggesting certain amendments of the law relating to the oaths of allegiance, supremacy, and abjuration, and the declaration required by the 9 Geo. 4. c. 17. The following is the result of their recommendations:— 1st. That it should no longer be an offence to maintain the spiritual authority of the Pope. 2d. That the clauses of the Uniformity Acts, by which any penalty is inflicted for resorting to places of worship where the Book of Common Prayer is not used, should be repealed. 3d. That the penalties imposed upon Roman Catholics, Dissenters, and Jews, for professing, exercising, or promoting

any religion other than that of the Established Church, should be repealed. 4th. That the Laws of Recusancy should be repealed. 5th. That the religious worship of the Jews should be protected in like manner as that of Roman Catholics and Dissenters. 6th. That, except as a qualification for sitting in Parliament, or for holding the high offices of State, from which Roman Catholics are excluded by the Roman Catholic Relief Act, the various forms of the oaths of allegiance, supremacy and abjuration, or the modifications thereof, now in use in England, Scotland and Ireland, should no longer be employed, but that instead thereof one form of an oath and one of an affirmation, to be so framed as to be unobjectionable to any class of persons, whatever religion they may profess, should be substituted.

Messrs. Starkie and Ker also, the Commissioners appointed to complete the Digest of the Law of Procedure in respect of indictable offences, in the preparation of which considerable progress had been made at the time of revoking the old and issuing the present commission, mentioned in our last Number, have completed that Digest; and the same, with their Report thereon, has been presented to both Houses of Parliament. Owing to the short period which has elapsed since its presentation we are only enabled to state, on the present occasion, that it appears to be a work of immense labour, and that the importance of the subject to the profession and the public cannot be too highly estimated. In the Appendix to the Report, also, is contained a number of most valuable communications in reply to the questions which were circulated by the Commissioners. We perceive that the Commissioners recommend most strongly the establishment of a Court of Appeal in Criminal Cases. We shall return to the consideration of this Report in a future number.

On the 25th of July, an important conversation arose, which, having no party bearing, was, of course, less attended to by the public than it will be by the profession. The Lord Chancellor, in presenting the eighth and last report of the Criminal Law Commissioners, on the important and difficult subject of Criminal procedure, the only portion of the criminal code that remained unfinished," pronounced an elegant and impressive panegyric on those able and learned men, who had, he said, now accomplished the great work committed to them with extraordinary diligence, with the most extensive and accurate learning, and with a success exceedingly to be rejoiced in by the parliament and the country. Lords Brougham and Campbell entirely concurred with the Lord Chancellor; and the former of these noble lords having been alluded to by the Lord Chancellor as having issued the commission and appointed the commissioners, observed that two of them, Sir E. Ryan, late Chief Justice of India, and Mr. V. Richards, had lately been added by the Lord Chancellor, and had laboured effectually, with Mr. Starkie, Mr. Bellenden Ker, and Mr. Amos; the former of whom brought to this important work the most profound and accurate knowledge of criminal law possessed by any living lawyer. Lord Brougham took occasion to express his hope that the Commission, when its labours of digesting the law were completed, might not be broken up, as there was another work for which its members were eminently well qualified, and which the interests of the public above every thing required to be undertaken; he meant the formation of a board, or department, for revising and preparing Acts submitted to Parliament, and he gave many of those arguments in favour of the plan, which we have already frequently supported in this journal.

Lord Campbell hoped that the labours of the Commission would not remain in the dust of the library, or be confined to blue books, but that England would

at length be possessed of a code like all other civilised countries, and that the subject might at length clearly know the law he was called upon, under the severest penalties, to obey. Lord Brougham said that he had only deferred pressing his Criminal Code Bill last session, founded on the former reports of the Commission, because the Lord Chancellor wished its provisions to be fully considered by the profession, and because he waited for the code of Procedure, which we were now happily enabled to prepare by means of the present report; but he gave notice that unless, which he should, of course, much prefer, the government themselves took the subject out of his hands he should, early next session, re-introduce his Bill of last year, extending it to Procedure, although he might possibly adopt the French precedent, and have one code of crimes and punishments, or penal code, and one of criminal procedure. The Lord Chancellor intimated his approval of this course.

A new set of Chancery orders have been issued and signed by all the Judges of the Court of Chancery except Vice-Chancellor Knight Bruce. They show great care in their preparation, and so far as they extend are calculated to do good. But we should not properly represent the professional feeling if we did not say that, as a whole, they have given general disappointment. Judges must bear to hear the truth, however disagreeable it may be, and we are bound to say that alterations much more searching and comprehensive are positively necessary in Chancery practice. We have hitherto had but little space to afford to this subject, but assuredly the will is not wanting; and if we have life and health spared us (we speak now in our individual and not in our corporate capacity), another long vacation shall not pass over our heads without an attempt to point out the proper reform. Our respect for the present Judges, not only for their learning and integrity but also for their good intentions in this respect, is great; it is, indeed, only exceeded by that which we entertain for certain other great judicial personages—Truth, Justice, and Equity. We notice with pleasure that the Chancery Practice Act has been renewed for another five years. This renewal, if there were nothing else, shows the wishes of the Judges.

We are exceedingly thankful to find that a suggestion which we humbly made in our Second Number, p. 417, has been already attended to. "The Duke of Grafton, for instance," we then said, "in the character of the Sealer of Writs, is still entitled to exact, and continues to exact, a fee from every person who has to seek the assistance of the Courts either of the Queen's Bench or Common Pleas for the recovery of the most trumpery civil right." By an act of the present session, 8 & 9 Vict. c. 34, this abuse has been entirely removed, the office having been abolished, with the entire concurrence of that amiable and enlightened nobleman, the present Duke of Grafton.

The death of Sir William Follett has rendered necessary a new arrangement of the law-officers of the Crown. Sir F. Thesiger has been appointed Attorney-General, and subsequently Mr. Fitzroy Kelly Solicitor-General. These appointments have given great satisfaction to the profession. The new Solicitor-General is distinguished as a practical reformer of the law.

An awkward quarrel seems to have sprung up between some of the Circuits and the Press. We beg to defer our judgment on this matter.

We have heard of a rumoured purchase of New Boswell Court "with all its parts and pendicles," to use the phraseology of our northern brethren, for the purpose of erecting a new College of Justice thereon, surrendering Westminster Hall to the railway groups. We are not prepared for this at present, but we may be prejudiced, and we will take time to consider. The bare sight

of the Forum has made many Ciceros. We must take care how we deprive Westminster Hall of all legal associations worth preserving.

The Circuit Commissioners have been delivered of their Report, or rather they have suffered a *fausse couche*. We are desirous of perpetuating only one of their recommendations,—the only one indeed in which they seem to be agreed. These learned and distinguished persons consider that no change should “take from the Bar and the Judges, and indeed the whole legal profession, that wholesome vacation, which alone by its annual recurrence brings them back with minds refreshed with leisure and varied study to their important duties.” In this we beg most heartily to express our concurrence, and trust that all our readers will act on it, as we ourselves purpose assuredly to do.

July 28.



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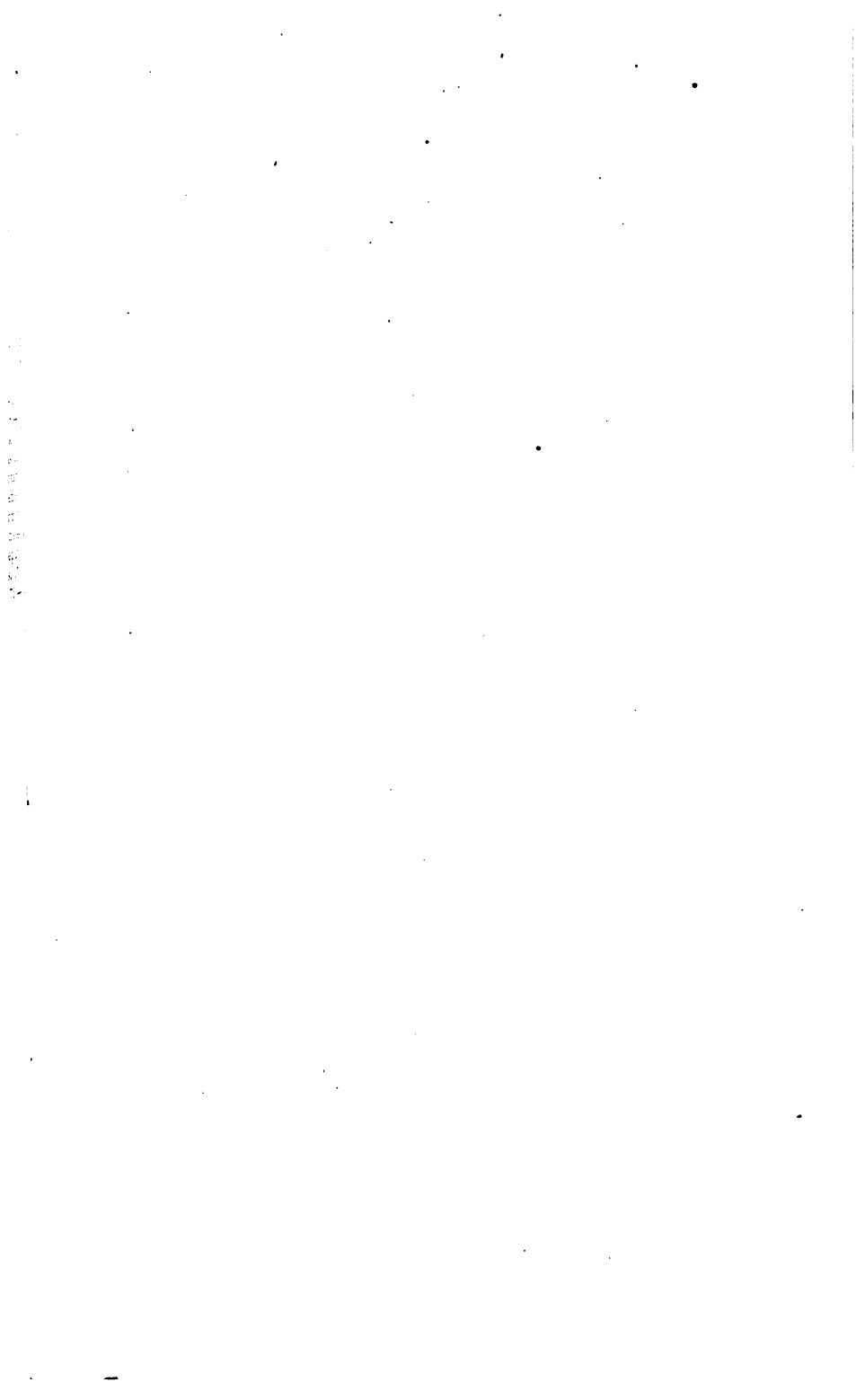
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